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JURISDICTIONAL STATEMENT

This is an appeal from a jury verdict finding Appellant, Mr. Charles Rutter, guilty of the crime of Murder in the First Degree, a Class A Felony, in violation of Section 565.020 RSMo and of Armed Criminal Action, a felony, in violation of Section 571.015 RSMo, as more particularly set forth in the information. (L.F. 31-34). After the jury's vedict, a timely motion for new trial was filed on July 21, 2000. (L.F. 115). Said motion was overruled by court order dated August 28, 2000. (L.F. 139). Allocution was granted, and the Court entered its judgment of conviction and imposed sentence, sentencing Mr. Rutter to life imprisonment in the Missouri Department of Corrections without the possibility of probation or parole on each count, with said sentences to run concurrently. (L.F. 139). A notice of appeal was timely filed on August 31, 2000, pursuant to Missouri Supreme Court Rules. (L.F. 3).

Mr. Rutter presents to this Court several issues on appeal. First, whether the trial court erred in allowing the admission of certain evidence and testimony in light of Mr. Rutter's motion to suppress evidence. Second, whether the trial court erred in declaring Dr. Martinez not an expert and limiting and/or commenting on this witness' testimony. The next two (2) issues involve the testimony of the State's witness Dr. Deideker and the admission of same. The fifth issue involves the trial court's denial of Mr. Rutter's motion for new trial. The sixth issue addresses the trial court's exclusion of specific acts of violence committed by the purported victim. Lastly, the seventh issue discusses the trial court's refusal to give a voluntary manslaughter instruction to the jury.

Mr. Rutter's Application for Transfer was granted by this Court for its review and

determination of the issues presented. The issues presented to this Court are within this Court's general appellate jurisdiction pursuant to Article 5, Section 3 of the Missouri Constitution, as said issues involve matters that are not within the exclusive jurisdiction of this Court.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ADMITTING THE TRIAL TESTIMONY OF DEPUTY CHUCK HELTON AND DEPUTY BRIAN YOUNG REGARDING THE OBSERVATIONS MADE AND ADMITTING EVIDENCE SEIZED DURING THEIR WARRANTLESS SEARCH OF MR. RUTTER'S HOME, INCLUDING, BUT NOT LIMITED TO, THEIR EXAMINATION OF THE INTERIOR OF A CLOSET LOCATED IN SAID HOME WHERE THIS ILLEGAL SEARCH RESULTED IN THEIR CLAIMED OBSERVATION THAT NO WEAPONS WERE PRESENT IN THAT SAME CLOSET, IN THAT SAID WARRANTLESS SEARCH, EXAMINATION AND SEIZURE WAS ONLY CONDUCTED AFTER THE HOME WAS SECURED BY THE OFFICERS PRESENT AND NO EXCEPTION TO THE SEARCH WARRANT REQUIREMENT WAS APPLICABLE, AND THEREFORE THIS WARRANTLESS SEARCH AND THE OBSERVATIONS MADE THEREIN VIOLATED DEFENDANT'S RIGHTS PROVIDED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE MISSOURI CONSTITUTION AND HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS PROVIDED IN THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

U.S. Const., amend IV

U.S. Const., amend V

Mo. Const. art. I, § 15

Mo. Const. art. I, § 10

Mincey v. Arizona, 437 U.S. 385 (1978)

Thompson v. Louisiana, 469 U.S. 17 (1984)

State v. Johnston, 957 S.W.2d 734 (Mo. 1997)

State v. Rogers, 573 S.W.2d 710 (Mo. Ct. App. 1978)

II. THE TRIAL COURT ERRED IN REFUSING THE OFFER OF DR. TERRY MARTINEZ AS AN EXPERT AT TRIAL AND IN DECLARING HIM NOT AN EXPERT IN THE PRESENCE OF THE JURY IN THAT A PROPER FOUNDATION WAS LAID FOR THE PRESENTATION OF HIS EXPERT TESTIMONY AND FOR HIS RENDERING AN EXPERT OPINION IN THIS MATTER AND THEREFORE THE TRIAL COURT'S LIMITATION OF THIS EXPERT TESTIMONY AND THE TRIAL COURT'S REJECTION OF DR. MARTINEZ AS AN EXPERT RESULTED IN SUBSTANTIAL AND IRREPARABLE PREJUDICE TO MR. RUTTER'S ABILITY TO PRESENT HIS DEFENSE AND IMPAIRED HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE UNITED STATES CONSTITUTION PURSUANT TO THE SIXTH AMENDMENT AND MISSOURI CONSTITUTION UNDER ARTICLE I, SECTION 18(A) AND HIS RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

U.S. Const. amend V

U.S. Const. amend VI

Mo. Const. art. I, § 10

Mo. Const. art I, § 18(a)

State v. Bearden, 748 S.W.2d 753 (Mo. Ct. App. 1988)

State v. Wren, 486 S.W.2d 447 (Mo. 1972)

III. THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF DR. DEIDEKER'S TESTIMONY OF BULLET PATTERN COMPARISON IN DETERMINING THE DISTANCE BETWEEN THE WEAPON AND MR. HINKLE AT THE TIME OF THE SHOOTING WHEN THIS OPINION AS TO DISTANCE WAS BASED SOLELY UPON DR. ROTHOVE'S TESTING OF BULLET PATTERNING WHERE SAID TESTING WAS CONDUCTED HORIZONTALLY AND THE EVIDENCE PRESENTED AT TRIAL ESTABLISHED THAT THE WEAPON WAS FIRED AT AN ANGLE AND THUS THAT DR. DEIDEKER WAS NOT QUALIFIED TO DRAW SUCH A CONCLUSION OR RENDER SAID OPINIONS AND THEREFORE SAID EVIDENCE WAS WITHOUT PROPER FOUNDATION, WAS PRESENTED TO THE JURY TO BE AN EXPERT CONCLUSION AND THEREFORE VIOLATED MR. RUTTER'S RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18(A) AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

U.S. Const. amend V

U.S. Const. amend VI

Mo. Const. art I, § 10

Mo. Const. art. I, § 18(a)

State v. Love, 963 S.W.2d 236 (Mo. Ct. App. 1997)

State v. Watt, 884 S.W.2d 413 (Mo. Ct. App. 1994)

IV. THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION DR. DEIDEKER'S TESTIMONY AS TO THE SPECIFIC EFFECTS OF BUTALBITAL IN THAT DR. DEIDEKER WAS NOT QUALIFIED TO DRAW SUCH A CONCLUSION OR RENDER SAID OPINIONS AND THEREFORE SAID EVIDENCE WAS WITHOUT PROPER FOUNDATION, WAS PRESENTED TO THE JURY TO BE AN EXPERT CONCLUSION AND THEREFORE VIOLATED MR. RUTTER'S RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18(A) AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

U.S. Const. amend V

U.S. Const. amend VI

Mo. Const. art I, § 10

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State v. Love , 963 S.W.2d 236 (Mo. Ct. App. 1997)

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V. THE TRIAL COURT ERRED IN NOT GRANTING MR. RUTTER'S MOTION FOR NEW TRIAL BASED UPON THE ADMITTED ERROR IN THE TESTIMONY OF TONY COLE IN THAT SAID TESTIMONY INVOLVED THE NEGATIVE IMPLICATION, WHICH WAS REPEATEDLY ARGUED BY THE STATE, THAT MR. RUTTER OBTAINED A PRESCRIPTION FOR BUTALBITAL IN THE NAME OF MR. RUTTER'S DECEASED RELATIVE IN THAT SAID TESTIMONY AND THE ARGUMENTS MADE THEREON SUBSTANTIALLY PREJUDICED MR. RUTTER'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE UNITED STATES AND MISSOURI CONSTITUTIONS.

U.S. Const. amend V

U.S. Const. amend VI

Mo. Const. art I, § 10

Mo. Const. art I, § 18(a)

State v. Stone, 869 S.W.2d 785 (Mo. Ct. App. 1994)

State v. Bernard, 849 S.W.2d 10 (Mo. 1993)

VI. THE TRIAL COURT ERRED IN REFUSING TO ALLOW MR. RUTTER TO PRESENT EVIDENCE OF SPECIFIC ACTS OF VIOLENCE BY MICHAEL HINKLE, THE VICTIM, IN THAT SAID EVIDENCE WAS ADMISSIBLE IN ORDER TO ESTABLISH AND SUPPORT THE DEFENDANT'S FEAR AND APPREHENSION OF MR. HINKLE WHICH IS ESSENTIAL TO MR. RUTTER'S SUBMISSION OF HIS ACTING IN SELF-DEFENSE, AND THIS ERROR SUBSTANTIALLY IMPAIRED MR. RUTTER'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW BESTOWED UPON HIM BY THE UNITED STATES AND MISSOURI CONSTITUTIONS.

U.S. Const. amend V

U.S. Const. amend VI

Mo. Const. art. I, § 10

Mo. Const. art I, § 18(a)

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U.S. Const. amend V

U.S. Const. amend VI

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Mo. Const. art I, § 18(a)

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STATEMENT OF FACTS

On June 29, 2000, the Appellant/Defendant, Mr. Charles Rutter, was found guilty by a jury of Murder in the First Degree and Armed Criminal Action for events occurring on April 4, 1999. (L.F. 137). Mr. Rutter received a sentence of life imprisonment without the possibility of probation or parole on each count, with these sentences to run concurrently. (L.F. 137).

Pretrial proceedings in this cause included Mr. Rutter filing his Motion to Suppress Evidence on August 2, 1999, (L.F. 37), and said motion was heard on May 9, 2000. (Supp. Tr. 2). In response to and in connection with this motion's hearing, the State presented the testimony of Deputy Chuck Helton (Supp. Tr. 25:20) and Deputy Brent Jones (Supp. Tr. 48:9).

Deputy Helton testified that he was dispatched to Mr. Rutter's home in connection with a shooting. (Supp. Tr. 26:13). Upon his arrival, he was informed by an emergency medical technician that there was only one person inside the home, more specifically in the bathroom, and that said individual was suffering from a fatal gunshot injury. (Supp. Tr. 26:19-22). Deputy Helton testified that upon his arrival to the home, no one other than the victim, Michael Hinkle, was located inside the residence. (Supp. Tr. 33:2; 37:1-2). Deputy Helton entered the home, went directly to the bathroom, observed the individual lying in the bathtub with what appeared to be a bullet wound, and then alighted from the residence. (Supp. Tr. 26:23-25; 27:1-16). Deputy Helton then secured the residence. (Supp. Tr. 27:18).

After the residence was secured, Deputy Helton, with the assistance of other officers, conducted a thorough search of the premises. (Supp. Tr. 27:21; 37:12-14). Mr. Rutter did

not consent to the search in question, and, despite being present, was never asked for such consent. (Supp. Tr. 34:1-3). Also, Deputy Helton conducted this search without having a search warrant in his possession, and without first applying for same. (Supp. Tr. 34:16).

Deputy Helton testified that after the residence was secured, and during the aforementioned search, that he seized certain items. (Supp. Tr. 29: 8-12). One of the items so seized was a .9mm pistol and shell casing. (Supp. Tr. 29:13-16). The length of this search is estimated conservatively at three (3) hours in length. (Supp. Tr. 26:12, Deputy Helton arrived at 1:45) (Supp. Tr. 39:9, Search warrant issued five (5) hours after leaving scene) (Supp. Tr. 42:19, Search warrant issued at 11:55).

Deputy Helton further testified at the Motion to Suppress hearing that the facts set forth in his Affidavit in Support of Application for Search Warrant to Authorize Search for Evidence accurately stated "the things [he] noticed when [he] first went into the house." (Supp. Tr. 44:16-20). Deputy Helton then stated at the hearing that said items include "the cartridge, the gun and the various other items, the blood on the carpet and the body." (Supp. Tr. 44:21-23). The latter reference of cartridge and gun, however, was not included in Deputy Helton's aforementioned affidavit. (L.F. 8-9). Deputy Young's testimony at this hearing only involved the blood, hair and fingernail samples taken from Mr. Rutter.

Arguments were offered to the trial court by both the State and Mr. Rutter. (Supp. Tr. 53:24-57:11). Mr. Rutter advised the trial court that his chief complaint was that exigent circumstances were not present at the time the search of the home was conducted. (Supp. Tr. 55:6-12). The trial court overruled and denied Mr. Rutter's Motion to Suppress Evidence.

(Supp. Tr. 58:5-21).

At trial, evidence was adduced that Mr. Hinkle, the victim, came to Mr. Rutter's home and inquired as to whether Mr. Rutter possessed any marijuana. (Tr. 612:7-8). Mr. Rutter advised Mr. Hinkle that he did not have any, to which Mr. Hinkle stated that he had some money and wanted to go buy some. (Tr. 612:21-22). Mr. Rutter advised Mr. Hinkle that he was without transportation, and that Mr. Hinkle did not need to get high. (Tr. 613:1-2; 614:1-3). Mr. Rutter testified that Mr. Hinkle then became agitated, (Tr. 614:5-6), and stated that Mr. Rutter did not know what he needed. (Tr. 614: 1-3). Mr. Rutter advised him that if he was going to get mad "he could just take his happy little ass home." (Tr. 614:10-12). Mr. Hinkle began to jump around and said "make me go home." (Tr. 614:14-15). Mr. Rutter advised him to sit down and relax, and Mr. Hinkle said no, make me go home. (Tr. 614:17-22).

Mr. Rutter testified that Mr. Hinkle then took a club and destroyed the lights in the ceiling fan. (Tr. 616:1-2). Mr. Hinkle then used the club to destroy the window in the living room. (Tr. 616:25; 617:1). Mr. Rutter asked Mr. Hinkle to "chill out," (Tr. 617:21), and Mr. Hinkle told him no. (Tr. 618:2). Mr. Hinkle then continued on his violent rampage and began destroying the remainder of Mr. Rutter's home.

Mr. Rutter also testified that, during this rampage, he was attacked by Mr. Hinkle and suffered physical injuries. In fact, the testimony included that Mr. Hinkle kicked Mr. Rutter in the kidneys while Mr. Rutter was on his hands and knees on the floor, (Tr. 622:16-17), punched him in his eye, (Tr. 623:8-9), and kicked him in the head. (Tr. 623:11-12). In addition to causing these physical injuries, Mr. Rutter testified that Mr. Hinkle displayed a knife and

destroyed Mr. Rutter's waterbed. (Tr. 616:11-636:19). At trial multiple witnesses testified to the destruction and disarray of Mr. Rutter's home. For example, Mr. Charles Warren, an emergency medical technician that responded to the dispatch, testified the home was in "total disarray, I mean things were broken and slashed." (Tr. 303:4-5). It was also uncontested at trial that Mr. Hinkle's blood contained near toxic levels of Butalbital, a prescription medication, at the time of his death. (Tr. 453:22).

The State presented the testimony of Charles Warren, an emergency medical technician that responded to the scene. (Tr. 287:13; 288:16). Mr. Charles Warren testified that his partner, Gina Warren, accompanied him to the scene, (Tr. 289:4-6), and that Ms. Gina Warren treated the injuries suffered by Mr. Rutter. (Tr. 294:22-23; 295:9-10). Mr. Charles Warren testified that there was "an inch to two inch laceration" on Mr. Rutter's cheekbone. (Tr. 295:9-10). Ms. Gina Warren testified that Mr. Rutter also suffered an injury to his forehead, (Tr. 761:10-11), and appeared to be in shock. (Tr.761:21). Pastor Donald Dement was another State witness that testified that Mr. Rutter appeared to be beat up and "had cuts on his face." (Tr. 258:17-20). Once again, Jerry Mann, the State's witness and a deacon who accompanied Pastor Dement to Mr. Rutter's home, testified that Mr. Rutter's eye was already blue and there was a cut on Mr. Rutter's face underneath his eye. (Tr. 285:3-5).

The evidence further established that Mr. Rutter suffers from a brain tumor and was diagnosed with neurofibromentosis, and received social security disability due to these physical problems. (Tr. 607:4-8). Moreover, Mr. Rutter testified that he has a real fear of being struck in his head because of the location and severity of the brain tumor. (Tr. 607:19-

21).

Evidence was also presented that, in the midst of this rampage and attack against Mr. Rutter and destroying Mr. Rutter's home, Mr. Hinkle said "I'm going to finish the job and I'm going to kill you." (Tr.651:23-24). Mr. Hinkle then started towards the closet where two (2) .22 rifles and one (1) loaded .12 gauge shotgun were kept. (Tr. 636:25; 637:3). Mr. Rutter repeatedly asked Mr. Hinkle to stop, Mr. Hinkle did not stop, but rather continued towards the closet. (Tr. 653:1-2). At this point, and believing that Mr. Hinkle would kill him, Mr. Rutter testified that he "knew [he] was going to die," when Mr. Hinkle bent over in the closet and went to the location where the guns are kept, Mr. Rutter was forced to shoot Mr. Hinkle. (Tr. 653:3-25; 654:1-15). From the moment Mr. Hinkle utters his deadly threat to the time that the one (1) fatal shot is fired only seconds elapsed. (Tr. 653:11).

The evidence also established that Mr. Rutter, after Pastor Dement and Jerry Mann and others arrived at his house, was overheard telling Mrs. Joan Hinkle, Mr. Hinkle's grandmother, that "he was going for a gun or he was, that I had to defend myself or something like that." (Tr. 252:2-4). Mr. Mann testified that Mr. Rutter, while awaiting the arrival of law enforcement officers, stated that they had a fight and Mr. Rutter had to kill him for fear of his own life. (Tr. 279:6-7).

Deputy Helton, at trial, testified once again concerning the search of Mr. Rutter's home. Deputy Helton testified that he was dispatched to Mr. Rutter's home in connection with a shooting. (Tr. 305:25; 306:1). Deputy Helton testified that he was informed by Mr. Charles Warren, an emergency medical technician that there was a man inside that was shot (Tr.

306:16-17), but further stated that Deputy Helton was then informed that the man inside was dead. (Tr. 306:20). Deputy Helton, once again, testified that no one was present in the home at the time of his arrival. (Tr. 308:4). After receiving this information, Deputy Helton then entered Mr. Rutter's home, observed Mr. Hinkle's condition, then exited the home and secured the residence. (Tr. 308:8-10). At trial, once Deputy Helton began to discuss his search of the home, Mr. Rutter objected to this testimony and evidence. (Tr. 313:1-9). This objection was overruled by the trial court, and Mr. Rutter's request that this objection be continuing and "constitutionalized" was granted.[1] (Tr. 313:11-14). Deputy Helton testified that only after he secured the residence did he begin the search in question, including the search of the closet located in Mr. Rutter's home. (Tr. 316:2-15). However, Deputy Helton testified that he did not observe any firearms located within the confines of this closet (Tr. 316:2-15). Deputy Helton testified that this search of the closet occurred during "the middle of the search." (Tr. 329:2-3).

Deputy Helton further testified that the interior of the home was dark, and that the overhead lights were broken. (Tr. 320:2-9). Moreover, the interior of the closet was also dark. (Tr. 326:10-12).

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[1] Prior to trial, Mr. Rutter filed his Stipulation, or in the Alternative Motion of Defendant for Approval of Court as to Request for Objections during Trial to be "Constitutionalized" or "Federalized." (L.F. 77). Said Motion, for efficiency and preservation of the record, sets forth the basis of a defendant's objections where said objection is "constitutionalized" or "federalized." The State consented to this Motion and same was ordered by the Court.

Deputy Young testified at trial that he took part in the search of Mr. Rutter's home. (Tr. 484:12-15). Deputy Young stated that he thoroughly examined the interior of the closet in question. (Tr. 485:3-9). He, like Deputy Helton, also testified that the interior of the closet was dark. (Tr. 490:13). Deputy Young stated that during this search he measured the area surrounding the closet as well as the closet itself. (Tr. 495:13-18). In fact, Deputy Young testified that he actually crawled into the closet, on his hands and knees, and used a mag flashlight in order to examine the interior of this closet. (Tr. 485:10-15). Deputy Young testified that no weapons or firearms were found in this closet. (Tr. 485:21-23).

Mr. Rutter presented the testimony of Nelson Dean. Mr. Dean testified that he heard of the shooting on the police scanner, and responded to Mr. Rutter's home. (Tr.719:2-4). Mr. Dean testified that he entered the home with Gina Warren, an emergency medical technician that responded to the dispatch. (Tr. 721:8). He testified that Gina Warren checked Mr. Hinkle, and discovered no pulse. (Tr. 722:15). At this time no law enforcement official was present. (Tr. 723:13). Mr. Dean testified that he found three (3) guns in the closet in question, and identified same at trial. (Tr. 725:7-24).

Mr. Dean further testified that he stayed at Mr. Rutter's home until the law enforcement officers were through with their search of the house, and once the home was released by the police officers, he and others began to board up the house due to the broken windows. (Tr. 727:15-16). Mr. Dean testified that he removed the guns from the closet during the boarding up process (Tr. 728:16), and transferred the custody of these guns to Billy Joe Luten, Mr. Rutter's step-father. (Tr. 728:21).

Archie Warren testified that he, like Mr. Dean, heard the information over the police scanner and responded to Mr. Rutter's home. (Tr. 737:8). He also testified that at the time of his arrival, no police officers were yet present. (Tr. 739:1-2). He testified that he entered Mr. Rutter's home when the ambulance crew entered said home. (Tr. 739:15-16). Mr. Warren testified that he also observed three (3) long guns in this closet. (Tr. 742:15). Mr. Rutter presented similar testimony from Gina Warren (Tr. 758:12), Donald Wright (Tr. 785:15-16), Doug Bond (Tr.793:23), and Billy Joe Luten (Tr. 802:13-14).

Dr. Carl Rothove, a criminalist with the Missouri Highway Patrol Crime Laboratory, testified to bullet patterning tests he conducted with the .9mm weapon in question. (Tr. 361:21-25). Dr. Rothove testified that the bullet patterning, presented in State's Exhibits 28, was created by firing the weapon at various distances. (Tr. 363:23). Dr. Rothove further testified that when he created these bullet patterns the weapon was not fired at various angles, but rather was fired only horizontally or straight-forward. (Tr. 369:11:13).

Dr. Rothove further opined that in order to accurately determine the distance from which a weapon was fired when same is fired at an angle, the recreation of the event would require multiple testing in order to reproduce the same pattern and "quite a few variables" must be considered. (Tr. 370:1-6). Dr. Rothove, when questioned whether the width of the pattern alone may be used to determine distance, testified "that is a good place to start to look at and then take into consideration the variables that could be encountered." (Tr. 372:6-8).

Dr. Deideker testified at the trial in this matter that he conducted the autopsy of Mr. Hinkle. (TR. 403:6). In conducting this autopsy, Dr. Deideker testified that he observed

powder tattooing on Mr. Hinkle's head near the entry point of the bullet injury. (Tr. 409:22-25). He testified that the size of this tattooing was approximately four (4) inches by two (2) inches (Tr. 410:17-18), and that the shape was "an ellipsoid or a rectangle." (Tr. 410:21-22).

The testimony further indicated that these shapes can be caused by the bullet entering the body at a slight angle. (Tr. 411:25; 412:1-14). Dr. Deideker testified that the bullet traveled on an angle, which was a slightly right to left path and slightly upward. (Tr. 412:20-21).

The State then attempted to have Dr. Deideker review Dr. Rothove's bullet patterning test results in an attempt to show the distance that the weapon was from Mr. Hinkle's head at the time it was fired. (Tr. 415:24-25; 416:1-3). Mr. Rutter objected to this testimony on the basis of Dr. Rothove's testimony and Dr. Deideker's lack of qualifications. (Tr. 416:4). Dr. Deideker further testified that bullet patterning is not his field of expertise, and that he is not a criminalist. (Tr. 422:10-14). The Court allowed Dr. Deideker to ultimately opine that the gun in this matter was fired four (4) to eight (8) inches from Mr. Hinkle's head. (Tr. 432:9-15).

It was uncontested by both the State and Mr. Rutter that present in Mr. Hinkle's body was Butalbital at a level of 6.3 micrograms per milliliter. (Tr. 453:22; 537:1-2). Dr. Deideker further testified as to the effects of Butalbital. (Tr. 435:4). Mr. Rutter timely objected to Dr. Deideker's testimony as to the effects of this drug on the common person, (Tr. 436:6-8), however, the trial court overruled said objection. (Tr. 436:15). Dr. Deideker testified that the specific characteristics of an individual with 6.3 micrograms per milliliters of Butalbital would

be sedation and drowsiness, and not violent behavior. (Tr. 437:3-16). Once again, Dr. Deideker candidly admitted that he is not an expert in this particular field, (Tr. 442:8), and that his testimony was based on only referring to two (2) separate medical texts. (Tr. 438:13-16).

The State presented the testimony of Dr. Christopher Long, who is a forensic toxicologist, but who has not witnessed any individuals actually suffering from an overdose of Butalbital. (Tr. 443:20). Dr. Long testified that an individual with a level of 6.3 micrograms per milliliter would not be an individual that is violent, confused and agitated, (Tr. 461:20), but would rather be sedate and a couch potato. (Tr. 462:8-11).

Mr. Rutter presented Dr. Martinez as witness, who testified that he is a clinical toxicologist and a pharmacologist, who is a professor at the St. Louis College of Pharmacy and also engages in the clinical practice of toxicology. (Tr. 529:3-7). Dr. Martinez also testified that he is Board Certified in Clinical Toxicology (Tr. 529:25), which is an accreditation bestowed upon him only after passing required examinations and treating a number of patients. (Tr. 530:2-3).

The evidence also demonstrated that Dr. Martinez holds four (4) college degrees, which include a Doctorate of Pharmacology, Masters Degree in Pharmacology, Masters Degree in Hospital Pharmacy, and a Bachelor of Science Degree in Pharmacy. (Tr. 530:10-17). Dr. Martinez, at the time of trial, taught, among others, a clinical medicine course "that deals with differential diagnosis between a toxin or pathology condition." (Tr. 531:8-16). Dr. Martinez at the time of trial had thirty-two (32) papers published and sixty (60) papers published at National and International meetings. (Tr. 532:3-7). Dr. Martinez was also a member of the

Society of Toxicology and American College of Toxicology, and the Society for Pharmacology and Experimental Therapeutics. (Tr. 532:10-16). Dr. Martinez had been directly involved with approximately 30,000 patients and assisted in their treatment. (Tr. 537:19-22). Dr. Martinez had also testified as an expert in both Missouri and Illinois on more than 100 different occasions, and, prior to the present case, was never rejected as an expert by any trial court. (Tr. 533:2-19). Dr. Martinez testified that he had observed individuals with similar levels of this drug to appear as they were severely intoxicated and act in an aggressive manner. (Tr. 541:13-16; Tr. 542:4-7).

It was uncontested that Dr. Martinez was not a licensed toxicologist and that there is no license for toxicology. (Tr. 53519-23). Mr. Rutter offered Dr. Martinez to the court as an expert, but the State's objection to this offer was sustained by the trial court, in the presence of the jury. (Tr. 535:24-25; 536:1-2).

Additionally, throughout the testimony of Dr. Martinez, the trial court placed substantial limits on the areas he may testify. The questions asked of Dr. Martinez and the objections sustained by the trial court are as follows:

a. 6.3 micrograms per milliliter, that is correct. (Tr. 537:1-2).

Q: Okay, and is there a significance to that level? (Tr. 537:3-4).

A: Yes there is. (Tr. 537:5).

Q: And what would that be? (Tr. 537:6).

Objection: I'm going to object to that your honor, if he's not been accepted as an expert how can he draw a conclusion? (Tr. 537:7-9).

COURT: Objection is sustained. Would you rephrase your objection [sic] about the significance, it might be difficult of the doctor to answer about the significance. (Tr. 537:10-13).

...

Q: In the case of someone who had ingested and whose measurement of the concentration level would be at 6.3, would that make a difference as to the possible side effects? (Tr. 539:24-25; 540:1-2).

Objection: I'm going to object again your honor. Now we're starting to talk about specifics and I don't think he's qualified to talk about specifics. (Tr. 540-3-5).

Defense: Judge, he's dealt in this particular drug before. He has observed people on it. He's board certified in toxicology. (Tr. 540:6-8).

COURT: The Court is not quarreling with what you just stated and the way you have formed your question. I'm going to sustain the object if you'll rephrase your question. The Court is not saying that he is not qualified at all, if you'll rephrase your question please. (Tr. 540:9-14).

Q: Have you observed specific effects and and [sic] side effects in people that you have treated or been in contact with, with a level consistent with 6.3? (Tr. 540:15-17).

Objection: Same objection. (Tr. 540:18).

COURT: And its sustained because the witness has testified that he is not licensed

physician so I don't ... (Tr. 540:19-21).

Defense: He's also testified that he has observed individuals in the E.R. (Tr. 540:22-23).

COURT: Your question was did he treat, well did he observe and I think you said treated. (Tr. 540:24-25).

...

Q: Does it have any effect with suppression of REM sleep? (Tr. 542:8-9).

A: Barbiturates do suppress REM sleep. (Tr. 542:10).

Objection: Your honor, I'm going to object and ask that that answer be stricken. We're talking about Butalbital, not all barbiturates. As part of my objection here is we're generalizing and I'm afraid that will leave [sic] to misunderstanding. (Tr. 542:11-15).

Defense: Judge he's already talking in terms of this particular drug. (Tr. 542:16-17).

Objection: He said barbiturates. (Tr. 542:18).

COURT: Objection is sustained. (Tr. 542:19).

Mr. Rutter, during his case-in-chief, also requested the introduction of certain specific acts of violence by Mr. Hinkle. (Tr. 664:18-25; 665:1-6). Prior to this request, Mr. Rutter filed his Motion in Limine requesting that he be allowed to introduce these specific acts. (L.F. 83). During an in camera hearing, Mr. Rutter's motion was heard, Mr. Rutter testified (Tr. 576:3-683:10) and Steven Craigmiles' testimony was received. (Tr. 568:8-575:16).

Mr. Craigmiles testified that, in June of 1998 (Tr. 570:22-24), he was attacked, without provocation, by Mr. Hinkle and was struck three (3) separate times in the face and head area. (Tr. 573:5-17). Mr. Rutter testified that he was aware of the details of this specific attack by Mr. Hinkle (Tr.577:12-14). In fact, Mr. Rutter also testified that Mr. Hinkle would brag about this incident, and had done so as recently as two (2) months prior to the shooting in question. (Tr. 581:24-25).

The trial court found the evidence offered not too remote in time (Tr. 583:22 and Tr. 585:2-6), but nonetheless refused Mr. Rutter the opportunity to present these acts of violence in his case-in-chief because the Court did not believe it was of sufficient quality. (Tr. 583:15-25; 584:1-9 and 589:14-17).

The State also offered the testimony of Tony Cole, the coroner. His testimony included the claim that he found in Mr. Rutter's home a bottle of prescription medication that belonged to Kenneth Rutter. (Tr. 382:22-24). This prescription medication was Butalbital (Tr. 383:2-4), which had been filled the day prior but there were only three (3) pills remaining. (Tr. 383:15-20). Kenneth Rutter is Mr. Rutter's grandfather who died in 1998. (Tr. 387:1-3). Mr. Cole further testified that he did not seize this prescription bottle, with the purported name of Kenneth Rutter, because the arresting officers took this bottle to the jail with Mr. Rutter in the event that Mr. Rutter needed his medication. (Tr. 384:8-10).

Despite the fact that Mr. Rutter's medication was taken with him when being taken into custody, the State, based upon Mr. Cole's testimony, cross-examined Mr. Rutter about filling prescriptions in his "dead uncle's name down in Poplar Bluff." (Tr. 670:25; 671:1-2). The

State further argued in closing the following:

> Tony Cole said he died between 11:00 and 2:00. Well, he told you that was an estimate, didn't he. Yet somehow that becomes the Holy Grail to hear the defense tell it. However, there is one things [sic] that he remembers very clearly that he told you about. That is the Butalbital prescription in the name of Kenneth Rutter, the dead uncle of the Defendant that had been filled within 48 hours prior to the scene and only had two (2) or three (3) tablets left. Now that's real suspicious to me, particularly when you consider you have a near toxic level of Butalbital in the victim.

(Tr. 890:2-13).

The jury instruction conference was approximately two (2) hours in length. (Tr. 843:14). During this instruction conference, Mr. Rutter advised the Court that he would request an instruction of voluntary manslaughter in that he believed evidence was introduced that gave rise to sudden passion arising from adequate cause, and therefore this instruction was proper. (Tr. 846:23-25; 847:1-2). The State objected to this instruction, and stated that "involuntary manslaughter" may not be submitted where the issue of self-defense is presented. (Tr. 847:4-20). The trial court adopted the State's position and refused the tendered instruction. (Tr. 848:2-6). The instruction was made part of the trial court's file, and labeled as Instruction No. A. (L.F. 106).

At the hearing on Mr. Rutter's Motion for New Trial, Tony Cole's testimony was

presented. Mr. Cole testified that his identification of the name of Kenneth Rutter on this prescription bottle was in error, when he in fact meant Charles Rutter. (Tr. 922:11-19). Mr. Cole further stated that "I made an error in my report, yes, and I would have to say that the prescription I believe was for Charles Rutter." (Tr. 922:24-25; Tr. 923:1). Mr. Cole stated that "It was Mr. Rutter's prescription and I believe that they took that to jail." (Tr. 925:6-7). Thus, this appeal follows.

I. THE TRIAL COURT ERRED IN ADMITTING THE TRIAL TESTIMONY OF DEPUTY CHUCK HELTON AND DEPUTY BRIAN YOUNG REGARDING THE OBSERVATIONS MADE AND ADMITTING EVIDENCE SEIZED DURING THEIR WARRANTLESS SEARCH OF MR. RUTTER'S HOME, INCLUDING, BUT NOT LIMITED TO, THEIR EXAMINATION OF THE INTERIOR OF A CLOSET LOCATED IN SAID HOME WHERE THIS ILLEGAL SEARCH RESULTED IN THEIR CLAIMED OBSERVATION THAT NO WEAPONS WERE PRESENT IN THAT SAME CLOSET, IN THAT SAID WARRANTLESS SEARCH, EXAMINATION AND SEIZURE WAS ONLY CONDUCTED AFTER THE HOME WAS SECURED BY THE OFFICERS PRESENT AND NO EXCEPTION TO THE SEARCH WARRANT REQUIREMENT WAS APPLICABLE, AND THEREFORE THIS WARRANTLESS SEARCH AND THE OBSERVATIONS MADE THEREIN VIOLATED DEFENDANT'S RIGHTS PROVIDED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE MISSOURI CONSTITUTION AND HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS PROVIDED IN THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

The first issue that Mr. Rutter presents to this Court is whether the trial court erred in admitting the testimony of Deputy Chuck Helton and Deputy Brian Young as it relates to items seized and areas searched after Mr. Rutter's home was secured and no exigent circumstances

were present. More specifically, whether the trial court erred in allowing these officers to testify that there were no weapons in Mr. Rutter's living room closet, which was only discovered during the aforesaid warrantless search. It is Mr. Rutter's contention that said search and the observations made therein were obtained unlawfully and in violation of Mr. Rutter's rights against unreasonable searches and seizures, and therefore should have been suppressed by the trial court and not admitted over Mr. Rutter's objections.

The standard of review that an appellate court must employ in reviewing a trial court's denial of a defendant's motion to suppress is whether there exists sufficient evidence to support the trial court's finding. State v. Galicia, 973 S.W.2d 926, 930 (Mo. Ct. App. 1998).

The existence of these weapons in the closet or the claimed non-existence of same was integral to the jury's verdict and determination as the primary issue presented is whether Mr. Rutter acted in self-defense. In other words, if the search of the closet were illegal then the officer's claimed observations and testimony that no weapons were in the closet would not be admitted at trial. State v. Johnston, 957 S.W.2d 734, 742 (Mo. 1997) (stating that "[w]hen considering a warrantless search and seizure, the analysis of its 'reasonableness' begins--but certainly does not end--with the inquiry whether the police are lawfully in the place from which they seize the evidence"); State v. Wright, 30 S.W.3d 906, 910 (Mo. Ct. App. 2000) (holding that "[w]hen we consider whether a warrantless search and seizure is reasonable under the fourth amendment, we begin our analysis by inquiring if the police are lawfully in the place from which they seized the evidence").

Mr. Rutter will present to this Court the testimony adduced at both (1) the motion to

suppress hearing and (B) the trial.

(A) MOTION TO SUPPRESS HEARING

In the case at bar, Mr. Rutter's Motion to Suppress Evidence was heard on May 9, 2000. (Supp. Tr. 2). The State presented the testimony of Deputy Chuck Helton (Supp. Tr. 25:20) and Deputy Brent Jones. (Supp. Tr. 48:9). Deputy Helton stated that he was dispatched to Mr. Rutter's home in reference to a shooting, and arrived at the home at approximately 1:45 p.m.. (Supp. Tr. 26:10-13). Upon his arrival he was informed by Charles Warren, a South Iron Ambulance employee, that there was only one individual inside the house, that he sustained a fatal gunshot would, and that said individual was in the bathroom. (Supp. Tr. 26:19-22). Deputy Helton examined the individual in the bathroom (Supp. Tr. 26:24), observed that he was lying in the bathtub with what appeared to be a bullet wound (Supp. Tr. 27:4-7), and then secured the home. (Supp. Tr. 27:18).

Deputy Helton, after securing the residence, re-entered the home and searched same. (Supp. Tr. 28:3). Deputy Helton further testified at this Motion to Suppress hearing that the facts set forth in his Affidavit in Support of Application for Search Warrant to Authorize Search for Evidence accurately stated "the things [he] noticed when [he] first went into the house." (Supp. Tr. 44:16-20). Deputy Helton then stated that said items include "the cartridge, the gun and the various other items, the blood on the carpet and the body." (Supp. Tr. 44:21-23). The latter reference of cartridge and gun, however, was not included in Deputy Helton's aforementioned affidavit. (L.F. 8-9). Nonetheless, no mention whatsoever is made that Deputy Helton searched the interior of the closet during his initial entry, nor is there a claim

that the contents of this closet were observed in his plain view.

Deputy Young testified at this hearing, but his testimony did not contain any claim that he searched the home and/or Mr. Rutter's closet. (Supp. Tr. 48:9). The search of Mr. Rutter's home lasted approximately three (3) hours. (Supp. Tr. 29:24-25 and 30:1-3, applied for search warrant after release of home) (Tr. 39:9, warrant issued approximately five (5) hours after release of home) (Tr.42:19, search warrant issued at 11:52). See also (Deputy Young Tr: 493:18-19 stating that search took "quite a bit of time"). The trial court denied Mr. Rutter's motion to suppress following the conclusion of the hearing. (Supp. Tr. 58:5-21). It is Mr. Rutter's position that the trial court's ruling should only be made within the context of the motion to suppress hearing and the evidence adduced therein. If the State failed to present sufficient evidence or testimony during this hearing a thereby justifying the warrantless search, then any and all items seized and any and all observations made following Deputy Helton's securing of Mr. Rutter's home should have been suppressed and not introduced at trial.

(B) TRIAL TESTIMONY

However, even if the testimony adduced at trial is examined in conjunction with the motion to suppress hearing testimony, and viewed in a light favorable to the trial court's ruling, Mr. Rutter's position continues to possess merit. Deputy Helton testified at trial that he was dispatched to Mr. Rutter's home in connection with a shooting. (Tr. 305:25; 306:1). Deputy Helton again testified that he was informed by Mr. Warren that there was a man inside that was shot, (Tr. 306:16-017), but further stated that he was informed that this man was dead. (Tr. 306:20). He testified that no individual, other than the victim, was inside the house at the time

of his arrival. (Tr. 308:4). After receiving this information, Deputy Helton then entered Mr. Rutter's home, observed Mr. Hinkle's condition, exited the home and secured the residence. (Tr. 308:8-10).

Deputy Helton began to testify to his search of the home, the observations he made therein, the seizure of certain items of evidence, and Mr. Rutter objected to the admission of same based upon the issues raised in his Motion to Suppress. (Tr. 313:1-9). The trial court overruled Mr. Rutter's objection but granted his request that his objection be continuing and this objection was "constitutionalized". (Tr. 313:11-14). Deputy Helton testified that only after securing the home and his reentry into same did he begin to examine the contents of Mr. Rutter's closet, and that his search did not discover any firearms in said closet. (Tr 316:2-15). Deputy Helton testified that he did not examine the interior of the closet until approximately "the middle of the search." (Tr. 329:2-3). Deputy Helton further testified that the interior of the home was dark, and that the overhead lights were broken. (Tr. 320:2-9). Moreover, the interior the closet was also dark. (Tr. 326:10-12).

Deputy Young also testified at trial, however, and in contrast to his previous testimony at the motion to suppress hearing, he now testified that he took part in a search of Mr. Rutter's home. (Tr. 484:12-15). More specifically, Deputy Young testified that he thoroughly examined the interior of the closet in question. (Tr. 485:3-9). Deputy Young testified that the closet was dark. (Tr. 490:13). Deputy Young also testified that he measured the area surrounding the closet as well as the closet itself. (Tr. 495:13-18). In fact, Deputy Young testified that he actually crawled into the closet, on his hands and knees, and used a mag

flashlight in order to examine the contents of this closet. (Tr. 485:10-15). Deputy Young testified that no weapons or firearms were found in this closet. (Tr. 485: 21-23).

Mr. Rutter testified that two (2) .22 rifles and one (1) loaded .12 gauge shotgun were in the closet at the time Mr. Hinkle reached into the closet, after Mr. Hinkle threatened to kill Mr. Rutter, and it was at that time Mr. Rutter shot Mr. Hinkle. (Tr. 636:25; 637:1-3).

Nelson Dean testified that he heard of the shooting on the police scanner, and responded to Mr. Rutter's home. (Tr.719:2-4). Mr. Dean testified that he entered the home with Gina Warren, an emergency medical technician, who responded to the dispatch. (Tr. 721:8). He testified that Gina Warren examined Mr. Hinkle and discovered no pulse. (Tr. 722:15). At this time no law enforcement official was present. (Tr. 723:13). Mr. Dean testified that he found three (3) guns in this closet, and identified same at trial. (Tr. 725:7-24).

Mr. Dean further testified that he stayed at Mr. Rutter's home until the law enforcement officers were through with their search of the house, and once the home was released by the police officers, he and others began to board up the house due to the broken windows. (Tr. 727:15-16). Mr. Dean testified that he removed the guns from the closet during the boarding up process (Tr. 728:16), and transferred custody of these guns to Billy Joe Luten, Mr. Rutter's step-father. (Tr. 728:21).

Archie Warren testified that he, like Mr. Dean, heard the information over the police scanner and responded to Mr. Rutter's home. (Tr. 737:8). He also testified that at the time of his arrival, no police officers were yet present. (Tr. 739:1-2). He testified that he entered Mr. Rutter's home when the ambulance crew entered said home. (Tr. 739:15-16). Mr. Warren

testified that he also observed three (3) long guns in this closet. (Tr. 742:15).

Mr. Rutter presented similar testimony from Gina Warren (Tr. 758:12), Donald Wright (Tr. 785:15-16), Doug Bond (Tr. 793:23), and Billy Joe Luten (Tr. 802:13-14). The jury was instructed in this matter as to self-defense in Instruction Number Six (6) (L.F. 97-98) and Instruction Number Eight (8) (L.F. 100-101).

(C) ANALYSIS

Once again, the narrow issue that Mr. Rutter presents to this Court is whether Deputy Helton's and Deputy Young's testimony regarding their observations made during the search of Mr. Rutter's closet constitutes an unreasonable search in violation of Mr. Rutter's Fourth and Fourteenth Amendment rights. The crux of Mr. Rutter's complaint is the receipt and admission of this testimony and their conclusions drawn from their unlawful search of the closet where those same officers did not possess the authority or right to search same and make the claimed observation that no weapons were present in the closet. It cannot be readily contested that the jury's decision in this case largely rested upon whether the weapons were present in the closet, and the quality of these officers' warrantless search is less than satisfactory.[2]

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[2] Deputy Helton testified that it was possible certain items, including Mr. Rutter's .9mm pistol, were moved prior to being seized and photographed. (Tr. 323:5-8). Deputy Helton testifying that it was possible, when confronted with his preliminary hearing testimony, that he did not look in the closet and see the weapons. (Tr. 328:1-7; 332:9-12). Also, additional items were missed during these officers' warrantless search, including

The Fourth Amendment of the United States Constitution and Article I, Section 15 of the Missouri Constitution protect individuals from unreasonable searches and seizures. U.S. Const. amend IV; Mo. Const. art. I, § 15. The Fifth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution guarantee a criminal defendant that he shall enjoy due process of law. U.S. Const. amend V; Mo. Const. art. I, § 10.

Section 542.296 of the Missouri Statutes provides that "[a] person aggrieved by an unlawful seizure made by an officer and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may file a motion to suppress the use in evidence of the property or matter seized." (1974). The term "matter" is defined as "substantial facts forming basis of claim or defense; facts material to issue; ... transaction, event, occurrence." *Blacks Law Dictionary* 6th Ed. (1990). Therefore, it is clear that an officer's claimed observation is a "matter" that is subject to suppression. See Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) (holding that by taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the initial entry).

It is axiomatic that a search conducted in violation of the Fourth Amendment mandates

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white towels with blood on them and bloody clothing (Tr. 710:21-23), bone handled knife in the home (Tr. 712:20-25), and a samurai sword in the home. (Tr. 673:13). Also, the three (3) long guns, whose contested existence, which were critical in Mr. Rutter's defense.

the exclusion from evidence the results of that search pursuant to the fruit of the poisonous tree doctrine. State v. Miller, 894 S.W.2d 649, 654 (Mo. 1995) (holding that "[g]enerally, evidence discovered and later found to be derivative of a Fourth Amendment violation must be excluded as fruit of the poisonous tree"). It is equally axiomatic that a warrantless search of an individual's home is per se unreasonable unless the search satisfies certain exceptions to the warrant requirement. State v. Epperson, 571 S.W.2d 260, 263 (Mo. 1978).

"Among the exceptions [to the search warrant requirement] are searches incident to a valid arrest, searches of cars stopped on a road, seizures of evidence in plain view, stop and frisk searches, searches with consent, searches to prevent destruction of evidence, searches to prevent the flight of a criminal, and searches in response to a need for help." Epperson, 571 S.W.2d at 263.

This Court recognized in State v. Childress, 828 S.W.2d 935, 942 (Mo. Ct. App. 1992), by its citation to State v. Olds, 603 S.W.2d 501, 506 (Mo. 1980), that "[b]y its clear language Section 542.296.6 places 'the burden of going forward with the evidence and the risk of nonpersuasion' on the state 'to show by a preponderance of the evidence that the motion to suppress should be overruled.'" Thus, it is the duty of the State to justify a warrantless search by presenting evidence that qualifies as an exception to the search warrant requirement. State v. Ritter, 809 S.W.2d 175, 177 (Mo. Ct. App. 1991) (stating that "[t]he burden is on the state to justify a warrantless search and to demonstrate that it falls within an exception to the warrant requirement").

It is uncontested that a warrant was not obtained nor applied for at the time of the search

of the closet. It is equally uncontested that Mr. Rutter did not consent to the search in question. (Supp. Tr. 34:1-3). Most importantly, it is uncontested that the interior of the closet was searched, for the first time, after the home was secured and during the middle of the search of the home following the officers' re-entry into same, and that the contents therein were not in plain view as Deputy Young required a flashlight to see therein and crawled into this closet on his hands and knees.

Mr. Rutter concedes that some of the items seized and observations made by the law enforcement officers arguably fall within the exigent circumstances and accompanying plain view exception to the search warrant requirement. Mr. Rutter's complaint is not with Deputy Helton's original entry into Mr. Rutter's home, nor is it with the officers' seizure of items discovered in plain view during said initial entry. However, the State failed to introduce evidence at the motion to suppress hearing and/or at trial to justify the thorough search of Mr. Rutter's home and the closet in question, including Deputy Young's crawling into the closet on his hands and knees using a mag flashlight to aid his sight.

EXIGENT CIRCUMSTANCES

An exception to the warrant requirement is exigent circumstances. Thus, a preliminary determination whether exigent circumstances were present at the time the closet was searched must be made. If the State established that exigent circumstances were present, then the search was permissible. However, if exigent circumstances were no longer present, the results and observations made during this search render that search illegal and the fruits thereof must be suppressed. Exigent circumstances is "a condition which permits dispensing with the

requirement of a warrant for a search **only** as long as the condition exists." *Search and Seizure 3rd Ed. § 14.1* (2000) (emphasis added). This exception to the warrant requirement is only applied "where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate." Arkansas v. Sanders, 442 U.S. 753, 759, 61 L.Ed 2d 235, 99 S.Ct. 2586 (1979) *overruled on other grounds by* California v. Acevedo, 500 U.S. 565, 114 L.Ed 2d 619, 111 S.Ct. 1982 (1991); See also Torres v. Puerto Rico, 442 U.S. 465, 472 (1979) (stating that "a warrant is normally a prerequisite to a search unless exigent circumstances make compliance with this requirement **impossible**") (emphasis added).

A warrantless search of a home where a killing occurred, but exigent circumstances terminated prior to the search in question, was held to be unlawful in Mincey v. Arizona, 437 U.S. 385, 395 (1978). In that case, a law enforcement official was killed during a controlled buy of narcotics from the defendant. Id. at 387. The law enforcement officers, following the shooting, located other individuals in need and then subsequently secured the home. Id. At 388. However, following the securing of the home, the law enforcement officers then began an extensive search of the defendant's home. Id. at 389.

The United States Supreme Court recognized that warrantless searches based upon exigent circumstances "must be 'strictly circumscribed by the exigencies which justify its initiation.'" Id. at 393. The Court further recognized that:

> Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case, as,

> indeed, the Arizona Supreme Court recognized ... There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility.

Id. at 394. The Court ultimately held that the search was unconstitutional, and did not satisfy the exigent circumstances exception because the exigency was not present at the time the search was conducted. Id. at 393.

The United States Supreme Court in Thompson v. Louisiana, 469 U.S. 17 (1984), reaffirmed its holding in Mincey. In Thompson, the defendant telephoned her daughter and conveyed to her that the defendant took her husband's life and was in the process of taking her own life as well. Id. at 18. The defendant's daughter contacted emergency personnel who later arrived at the defendant's home. Id. These emergency personnel, including police officers, entered the home and discovered that the husband was dead and the defendant was unconscious. Id. The defendant was then immediately taken to the hospital for treatment. Id.

In Thompson, the testimony indicated that the first officers on the scene conducted a search of the premises for other victims or suspects and secured the home, but no evidence was discovered nor seized at that point in time. Id. at 19. Thirty-five (35) minutes later two (2) homicide investigators conducted a "general exploratory search for evidence," which was approximately two (2) hours in length. Id. This general search produced a pistol, a torn up note, and another letter believed to be a suicide note. Id. These items were admitted at trial over the defendant's objections. Id.

The Thompson Court recognized that "[a]lthough the homicide investigators in this case may well have had probable cause to search the premises, it is undisputed that they did not obtain a warrant." Id. at 20-21. The Court, in reversing the defendant's murder conviction, reaffirmed the holding in Mincey and stated that "nothing in Mincey turned on the length of time taken in the search or the date on which it was conducted. A 2-hour general search remains a significant intrusion on petitioner's privacy and therefore may only be conducted subject to the constraints - including the warrant requirement - of the Fourth Amendment." Id. at 21.

In State v. Tidwell, 888 S.W.2d 736, 743 (Mo. Ct. App. 1994), the Court of Appeals held that no manifest injustice occurred in the trial court's denial of the defendant's motion to suppress. The Court reviewed the issue under the manifest injustice standard because it determined that the issue was not properly preserved for appellate review and the record in that case was scant. Id. at 739. In that case, law enforcement officers responded to a home and observed a dead body lying in the front yard. Id. at 738. Following this discovery, the officers approached the front door, knocked, and the defendant answered the door. Id. The defendant was immediately taken into custody, and did not respond to the officer's inquiry as to whether any other individuals were in the home. Id. The officer, due to the defendant's lack of response, then entered the home to see if anyone was inside the home, and learned that no one was, in fact, present. Id. It was during this initial entry that the officer discovered a butcher knife and dishpan of water in plain view. Id. The Tidwell Court implied that once the officer entered the home and determined that no emergency existed, the exigency exception to the

search warrant requirement terminated. Id. at 741. The officers then collected the evidence that was discovered in plain view during the officer's exigency search. Id. at 738.

The Tidwell Court held that the officer was lawful in his initial entry under the exigent circumstances exception to the search warrant. Id. at 740. The Court further held that the evidence discovered during this initial entry was admissible as an exception under the plain view doctrine. Id. at 741. However, in affirming the denial of the motion to suppress, the Court also recognized that the record does not establish that the search went beyond the areas inspected by the officer "during his exigent circumstances search." Id. Thus, the Tidwell Court, by its reference to the unclear trial record, indicated that if the search would have extended to any areas other than that discovered during the exigency search of the home, said items would be suppressible. Id.

The Tidwell Court relied upon State v. Rogers, 573 S.W.2d 710 (Mo. Ct. App. 1978), in rendering its decision. In Rogers, the Court held that the items discovered during a thorough search of the home, and not in plain view during the exigency search of said home, must be suppressed due to the officers' violating the Fourth Amendment. Rogers, 573 S.W.2d at 717. In that case, the officers responded to the home in question based upon a dispatch that a dead body was located therein. Id. at 713. After entering the home, discovering the body, and determining that no other individuals were located therein, the officers secured the home. Id. The Court held that at that moment exigent circumstances terminated. Id. at 714. However, the officers reentered the home and conducted a thorough, three (3) hour search of the residence, including the search of a trash can, behind a heater and in the kitchen cabinets. Id.

at 713; 715.

The Rogers Court recognized that "a true emergency will justify police entry upon private premises to give immediate aid, and in cases of homicide, to find victims and seek out killers, but will not justify a search unless there be apt cause for concern that evidence would be lost, destroyed or removed before a search warrant could be obtained." Id. at 714. The Court stated that at the point that the kitchen cabinets and the trash can were searched, no exigent circumstances existed as the body had been found, the house was free of occupants, and the house was secured removing the risk that evidence would be damaged or lost. Id. at 715.

It was recognized that "[o]ne constant rationale underlies each of these cases [authorizing an exigency search]: when the emergency which validates the original warrantless entry ceases, further investigation may not proceed without authority of warrant." Id. at 716. The Court ultimately held that the evidence discovered in plain view during the initial entry was admissible, but the evidence discovered during the subsequent search of the kitchen cabinets and trash can were inadmissible. Id. at 717.

The Court's holding in Rogers, as well as the United States Supreme Court's holdings in Mincey and Thompson, is determinative of the issue presented by Mr. Rutter herein. It is uncontested that Deputy Helton had secured the residence, discovered the body, and determined that the home was free of occupants, prior to the reentry and his and Deputy Young's claimed search and examination of the closet. It is also uncontested that Deputy Helton did not possess a search warrant for Mr. Rutter's home at this time. Much like Rogers

and Thompson, this issue involves a thorough, three (3) hour search of a home, including a compartment (cabinet vs. closet) found therein, where said search is conducted after the exigency of the situation terminated. Again, like Rogers, this search of the compartment is illegal and in direct contravention with the Fourth Amendment rights bestowed upon Mr. Rutter.

In Arizona v. Hicks, 480 U.S. 321, 324-325 (1987), the United States Supreme Court held that an officer's moving of stereo equipment in order to view the serial numbers constituted a search for Fourth Amendment purposes. In that case, the officers responded to an apartment as a result of a bullet being fired and injuring a tenant in a neighboring apartment. Id. at 323. The officers entered the apartment to search for the "shooter, for other victims, and for weapons." Id. One of the officers noticed stereo equipment that "seemed out of place" for the "ill-appointed four-room apartment." Id. The officer moved the stereo components in order to observe the serial numbers contained thereon. Id. It was discovered that said serial numbers matched those of equipment that was stolen during an armed robbery. Id.

The Supreme Court stated that "[a] dwelling-place search, no less than a dwelling -place seizure, requires probable cause, and there is no reason in theory or practicality why application of the 'plain view' doctrine would supplant that requirement." Id. at 328. What is telling is that Justice O'Connor's dissent, and the majority's response thereto, clearly recognized the distinction between a cursory inspection and a search. Id. at 328-329. The former only includes "merely looking at what is already exposed to view, without disturbing it", and a search including the movement of items and examination of same. Id. Thus, the

illegal search of this equipment and the officer's observation made thereto required that the results of said search be excluded from evidence. Id. at 329.

In State v. Johnston, 957 S.W.2d 734 (Mo. 1997), this Court held that a .22 caliber rifle found under a sofa should have been excluded from evidence due to a Fourth Amendment violation occurring. Id. at 744. In that case, a 911 telephone call was placed from the Johnston residence and paramedics and a law enforcement officer responded. Id. at 739. Upon their arrival to the home a male voice requested that they come inside the home and provided the needed medical attention. Id.

The victim, the defendant's wife, was pronounced dead at the scene. Id. at 740. Upon the defendant learning of this death became enraged and made references to a motorcycle gang attacked his wife seeking revenge against the defendant. Id. Due to the defendant's irrate behavior, he was handcuffed and placed into a police vehicle. Id. The investigating officers then became aware that an eleven (11) year old child also resides in the home. Id. Armed with this information, the officers began searching the home in an attempt to locate this child and to determine whether there were any motorcycle gang members lurking in the home Id. at 740-741.

The Johnston Court held that the officers acted appropriately in light of the circumstances in that an officer "discovered a dead body in the house. This transformed the dwelling into a crime scene that permitted the police, who had authority to be in the house as a result of Johnston's invitation to [the investigating officer] to conduct a cursory check of the house for other victims, to determine the presence of any of the persons that Johnston claimed

were responsible for the murder and to protect themselves from Johnston or others who might seek to do them harm." Id. at 742. The Court distinguished Mincey and stated that "[i]n Mincey, the police knew the homicide was criminal and knew who did it--Mincey was the only person in the bedroom where the shots were exchanged. Here, Johnston claimed that the brutal beating of his wife was inflicted by a rival motorcycle gang. This claim raises the possibility of danger to police from other potential suspects, each of whom is unaccounted for and potentially fleeing the scene, destroying evidence or secreted in the residence posing a threat of attack." Id. at 743. As such, the Johnston Court held that many items discovered in plain view during the exigency circumstances search were admissible, including a pistol, bloody washcloth, dented pipe and blood and hair samples. Id. at 743-744.

However, the Court held that a Fourth Amendment violation occurred concerning a .22 caliber rifle with a freshly broken stock found under a sofa. Id. at 744. The evidence presented as it concerns this rifle included an officer noticing fresh wood fragments by a sofa, but that no part of the rifle was in plain view. Id.

The Johnston Court provided further guidance as it concerns the search of a closet where a shotgun was located. The Court held this search valid because the police only opened the closet in an attempt to locate the family's missing son and possibly searching for rival motorcycle gang members that the defendant claimed had killed his wife. Id. In fact, it appears that much reliance was placed upon the fact that this was not a search for evidence, but rather a cursory inspection to locate other individuals that may be in the home, which places at risk officer safety, places at risk the destruction of evidence, and places at risk that an individual

may not receive needed medical attention.

In the case at bar, Deputy Helton knew that only one (1) individual was located in the home and that said individual was dead, and therefore the need to give medical attention was non-existent. (Supp. Tr. 26:13) (Tr. 306:16-20). Further, Deputy Helton secured the residence and, once again knew that no one was in the home that could possibly destroy any claimed evidence contained therein. (Supp. Tr. 27:18) (Tr. 308:4-10). Lastly, Deputy Helton knew that no one was in the residence and thus officer safety was not at issue. (Supp. Tr. 33:2; 37:1-2) (Tr. 308-4). Thus, based upon the State's evidence presented at the motion to suppress hearing and based upon the State's evidence presented at trial there were no exigent circumstances present to justify the search of Mr. Rutter's closet. Therefore, Mr. Rutter requests that this Court rule that the search of this closet was unlawful and determine that the exigency circumstances exception to the search warrant requirement.

INEVITABLE DISCOVERY/INDEPENDENT SOURCE

The only remaining possible, although unlikely, exception to the search warrant requirement is the inevitable discovery doctrine. Mr. Rutter submits that this doctrine is inapplicable for two (2) separate reasons, to-wit: (1) there was absolutely no evidence presented by the State that proper procedures would be utilized in this case and (2) after the officers released Mr. Rutter's home, the home was boarded and the firearms in question were removed which thereby alters and contaminates the scene.

In Nix v. Williams, 467 U.S. 431, 441 n. 4 (1984), the United States Supreme Court recognized that "[t]he ultimate or inevitable discovery exception to the Exclusionary Rule is

closely related in purpose to the harmless-error rule ... The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct."

"To invoke the inevitable discovery exception to the exclusionary rule, the State must establish by a preponderance of the evidence that (1) certain standard, proper, and predictable procedures **would have been** utilized in the case, and (2) those procedures inevitably **would have** led to discovery of the challenged evidence." State v. Young, 991 S.W.2d 173, 177 (Mo. Ct. App. 1999) (emphasis added). Thus, as it relates to both factors, the critical question is what certainly would occur versus what could have in theory occurred.[3]

However, and as been recognized by the Courts, the inevitable discovery doctrine is

[3] It must be brought to this Court's attention the exact language used by the Courts in determining whether the inevitable discovery doctrine is applicable in a given circumstance. See State v. Miller, 894 S.W.2d 649, 662 fn.5 citing Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1981) (stating that "[t]he inevitable discovery rule provides that information obtained through an unlawful search may be admissible if it is shown that such evidence **would** have been discovered even if the illegality had not occurred"); State v. Young, 991 S.W.2d 173, 177 (Mo. Ct. App. 1999) ("would" have been discovered through lawful means); Weldin v. State, 973 S.W.2d 107, 112 (Mo. Ct. App. 1998) ("would have been acquired without the illegal police conduct"); State v. Taylor, 943 S.W.2d 675, 678 (Mo. Ct. App. 1997) (holding that inevitable discovery applies where police relied upon issued, but invalid, search warrant).

difficult to apply in many circumstances. In United States v. Leake, 95 F.3d 409, 412 (6th Cir. 1996), the Court stated the following:

> The inevitable discovery doctrine is conceptually more problematic than the independent source doctrine because it involves a degree of deducing what would have happened rather than simply evaluating what actually happened. Under the inevitable discovery doctrine, evidence may be admitted if the government can show that the evidence inevitably would have been obtained from lawful sources in the absence of the illegal discovery. By its nature, the inevitable discovery doctrine requires some degree of speculation as to what the government would have discovered absent the illegal conduct. Speculation, however, must be kept to a minimum; courts must focus on demonstrated historical facts capable of ready verification or impeachment. The burden of proof is on the government to establish that the tainted evidence would have been discovered by lawful means.

First, as it concerns whether standard, proper, and predictable procedures would have been utilized, what is notable is that the officers sought and received a search warrant only after they released the home to Mr. Rutter's family members following the first search because they desired another carpet sample and to take additional photographs. At the Motion to Suppress

hearing, these officers testified that they sought a search warrant, for the first time, because they believed it was **now necessary**, and not to justify their prior search. Thus, it is clear from their pattern of actions that they would not have sought this search warrant concerning their search of the home, which occurred approximately five (5) hours after the release of the home, had they not desired additional photographs and a carpet sample. Thus, there was no evidence presented by the State that proper procedures would have been utilized as it concerns the initial search.

Mr. Rutter brings to this Court's attention United States v. Allen, 159 F.3d 832, 841-842 (4th Cir. 1998). The Court, in determining whether the inevitable discovery doctrine is applicable, stated the following:

> [W]hen evidence could not have been discovered without a subsequent search, and no exception to the warrant requirement applies, and no warrant has been obtained, and nothing demonstrates that the police would have obtained a warrant absent the illegal search, the inevitable discovery doctrine has no place. In those circumstances absolutely nothing suggests, let alone proves by a preponderance of the evidence, that the illegally obtained evidence inevitably would have been discovered. The inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that

the police would have obtained a warrant. Any other rule would emasculate the Fourth Amendment.

Thus, the evidence before the trial court and, what is now before this Court evidences the fact that the police would never had sought a search warrant five (5) hours after leaving the residence but for the want of additional photographs and a carpet sample. This testimony renders the inevitable discovery doctrine inapplicable in the case at bar.

The next factor involves whether the claimed observations would have been made if lawful procedures were used. It was only after the home was released by the officers present that the scene was altered or changed by the removal of items contained therein, which renders the inevitable discovery doctrine inapplicable because it is both logically and factually impossible to demonstrate what would have been discovered. See State v. Milliorn, 794 S.W.2d 181, 186 (Mo. 1990) citing Nix v. Williams, 467 U.S. 431, 445 (1984) (emphasizing that the "[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment"). Thus, the inevitable discovery doctrine is inapplicable where the characteristics of the home were altered as there can be no inevitable discovery of the same circumstance. In fact, as emphasized in Nix, speculation should not be employed as to what would have happened and what would have been discovered. See also United States v. Leake, 95 F.3d 409, 412 (6th Cir. 1996) (holding that the inevitable discovery rule allows only minimal speculation); United States v. Rogers, 102 F.3d 641, 646 (1st Cir. 1996) (inevitable discovery doctrine requires government to prove high probability that evidence would have been discovered by lawful means).

Therefore, in light of the foregoing, Mr. Rutter requests that this Court enter an Order holding that the search of the closet in Mr. Rutter's home was in violation of Mr. Rutter's Fourth Amendment rights, enter an Order suppressing from evidence Deputies Helton's and Young's testimony as to their claimed observations of the interior of the closet, enter an Order reversing Mr. Rutter's conviction for murder in the first degree and armed criminal action, and remand this matter for further proceedings.

II. THE TRIAL COURT ERRED IN REFUSING THE OFFER OF DR. TERRY MARTINEZ AS AN EXPERT AT TRIAL AND IN DECLARING HIM NOT AN EXPERT IN THE PRESENCE OF THE JURY IN THAT A PROPER FOUNDATION WAS LAID FOR THE PRESENTATION OF HIS EXPERT TESTIMONY AND FOR HIS RENDERING AN EXPERT OPINION IN THIS MATTER AND THEREFORE THE TRIAL COURT'S LIMITATION OF THIS EXPERT TESTIMONY AND THE TRIAL COURT'S REJECTION OF DR. MARTINEZ AS AN EXPERT RESULTED IN SUBSTANTIAL AND IRREPARABLE PREJUDICE TO MR. RUTTER'S ABILITY TO PRESENT HIS DEFENSE AND IMPAIRED HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE UNITED STATES CONSTITUTION PURSUANT TO THE SIXTH AMENDMENT AND MISSOURI CONSTITUTION UNDER ARTICLE I, SECTION 18(A) AND HIS RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

Mr. Rutter next presents the issue of whether the trial court erred in refusing to accept Dr. Terry Martinez as an expert witness at trial, and the trial court's limitations placed on this testimony as to the specific effects of Butalbital. It is Mr. Rutter's position that Dr. Martinez possessed the necessary expertise, through his employment and training, to render an expert opinion that would aid the jury in determining the issues presented. Mr. Rutter further states that the trial court's rejection of Dr. Martinez as an expert, in the presence of the jury, gave

rise to reversible error and irreparably impaired Mr. Rutter's ability to present a defense in this matter.

It is Mr. Rutter's understanding that the issue of whether an expert's testimony is admissible is within the trial court's sound discretion, and is reversible only if it is an abuse of said discretion. State v. Sloan, 912 S.W.2d 592, 596 (Mo. Ct. App. 1995). "An abuse of discretion has been defined as, 'a judicial act which is untenable and clearly against reason and which works an injustice.'" Bodimer v. Ryan's Family Steakhouses, Inc., 978 S.W.2d 4, 8 (Mo. Ct. App. 1998).

The Sixth Amendment of the United States Constitution and Article I, Section 18(a) each guarantee a fair trial to a criminal defendant. U.S. Const. amend VI; Mo. Const. art. I, § 18(a). The Fifth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution guarantee a criminal defendant that he shall enjoy due process of law. U.S. Const. amend V; Mo. Const. art. I, § 10.

The exact rationale employed by the trial court in rejecting Dr. Martinez as an expert is unclear at the time the ruling was made, (Tr. 536:1-2), and the State's objection to his offer is equally unclear. (Tr. 535:24-25). After voir dire of the witness by the State, which only established that Dr. Martinez is not a physician, and is not a licensed toxicologist or a licensed pharmacologist only because there is no license for same, the State objected "to the offer." The trial court stated that "[i]t will be sustained. I will take it with each question and proceed please." (Tr. 535:24-25; 536:1-2).

Mr. Rutter presented evidence that Dr. Martinez is toxicologist and pharmacologist,

who is a professor at the St. Louis College of Pharmacy and also engages in the clinical practice of toxicology. (Tr. 529:3-7). Dr. Martinez also testified that he is Board Certified in Clinical Toxicology (Tr. 529:25), which is an accreditation for his passing certain examinations and assisting in the treatment of a number of patients. (Tr. 530:2-3).

The evidence also demonstrated that Dr. Martinez holds four (4) college degrees, including a Doctorate of Pharmacology, Masters Degree in Pharmacology, Masters Degree in Hospital Pharmacy, and a Bachelor of Science Degree in Pharmacy. (Tr. 530:10-17). Dr. Martinez also currently teaches, among others, a clinical medicine course "that deals with differential diagnosis between a toxin or pathology condition." (Tr. 531:8-16). Dr. Martinez, at the time of trial, had thirty-two (32) research papers published and sixty (60) presentations published at National and International meetings. (Tr. 532:3-7). Dr. Martinez was also a member of the Society of Toxicology and American College of Toxicology, and the Society for Pharmacology and Experimental Therapeutics. (Tr. 532:10-16). Dr. Martinez had been involved with approximately 30,000 patients and assisted in their treatment. (Tr. 537:19-22). Dr. Martinez had also testified as an expert in both Missouri and Illinois on more than 100 different occasions, and, prior to the present case, was never rejected as and expert by any trial court. (Tr. 533:2-19).

It was uncontested that Dr. Martinez was not a licensed toxicologist and that there is no license for toxicology. (Tr. 535:19-23). Mr. Rutter offered Dr. Martinez to the trial court as an expert, but the State's objection to this offer was sustained by the trial court.

The State offered the testimony of Dr. Christopher Long in its case-in-chief, and

established that he was a forensic toxicologist, but Dr. Long never observed any individual actually suffering from an overdose. (Tr. 443:20). Dr. Long never testified that he was a licensed toxicologist, and Mr. Rutter submits that this lack of testimony is due directly to the fact that such a license is unavailable.

The primary difference between the two (2) doctors' testimony is the specific effect that Butalbital will have on an individual at the level found in Mr. Hinkle's system. Dr. Long testified that an individual with the a level of 6.3 micrograms would not be an individual that is violent, confused and agitated, (Tr. 461:20), but would rather be sedated and a couch potato. (Tr. 462: 8-11). While Dr. Martinez testified that he has actually observed individuals with similar levels of this drug to appear as they were severely intoxicated and act in an aggressive manner. (Tr. 541:13-16; Tr. 542:4-7).

However, the unnecessary limitations placed by the trial court on Dr. Martinez's testimony, and the negative inferences drawn by the jury from the trial court's refusal to recognize Dr. Martinez as an expert in his field, substantially affected the jury's acceptance of said evidence. Moreover, such limitations invaded the province of the jury as this was a matter of credibility, if any, and not an issue of admissibility. The trial court's statements, which were made in the presence of the jury, unduly prejudiced Mr. Rutter's right and ability to defend against the charges lodged against him herein.

The trial court's aforementioned rejection of Dr. Martinez resulted in lasting effects on the questions asked by Mr. Rutter, and the answers provided by Dr. Martinez. The exact questions asked of Dr. Martinez and the objections sustained by the trial court are as follows:

A: 6.3 micrograms per milliliter, that is correct. (Tr. 537:1-2).

Q: Okay, and is there a significance to that level? (Tr. 537:3-4).

A: Yes there is. (Tr. 537:5).

Q: And what would that be? (Tr. 537:6).

Objection: I'm going to object to that your honor, if he's not been accepted as an expert how can he draw a conclusion? (Tr. 537:7-9).

COURT: Objection is sustained. Would you rephrase your objection about the significance, it might be difficult of the doctor to answer about the significance. (Tr. 537:10-13).

...

Q: In the case of someone who had ingested and whose measurement of the concentration level would be at 6.3, would that make a difference as to the possible side effects? (Tr. 539:24-25; 540:1-2).

Objection: I'm going to object again your honor. Now we're starting to talk about specifics and I don't think he's qualified to talk about specifics. (Tr. 540-3-5).

Defense: Judge, he's dealt in this particular drug before. He has observed people on it. He's board certified in toxicology. (Tr. 540:6-8).

COURT: The Court is not quarreling with what you just stated and the way you have formed your question. I'm going to sustain the

objection if you'll rephrase your question. The Court is not saying that he is not qualified at all, if you'll rephrase your question please. (Tr. 540:9-14).

Q: Have you observed specific effects and and [sic] side effects in people that you have treated or been in contact with, with a level consistent with 6.3? (Tr. 540:15-17).

Objection: Same objection. (Tr. 540:18).

COURT: And its sustained because the witness has testified that he is not licensed physician so I don't ... (Tr. 540:19-21).

Defense: He's also testified that he has observed individuals in the E.R. (Tr. 540:22-23).

COURT: Your question was did he treat, well did he observe and I think you said treated. (Tr. 540:24-25).

...

Q: Does it have any effect with suppression of REM sleep? (Tr. 542:8-9).

A: Barbiturates do suppress REM sleep. (Tr. 542:10).

Objection: Your honor, I'm going to object and ask that that answer be stricken. We're talking about Butalbital, not all barbiturates. As part of my objection here is we're generalizing and I'm afraid that will leave [sic] to misunderstanding. (Tr. 542:11-15).

Defense: Judge he's already talking in terms of this particular drug. (Tr. 542:16-17).

Objection: He said barbiturates. (Tr. 542:18).

COURT: Objection is sustained. (Tr. 542:19).

Expert testimony is clearly permissible in criminal cases "when it is clear that the jurors themselves are not able to draw correct conclusions from the facts proved because they lack experience or knowledge of the subject matter." State v. Calvert, 879 S.W.2d 546, 549 (Mo. Ct. App. 1994); See also State v. Love, 963 S.W.2d 236, 241 (Mo. Ct. App. 1997) (holding that "[e]xpert testimony is admissible on subjects about which the jurors lack experience or knowledge, but expert testimony should be excluded if it does not assist the jury or if it unnecessarily diverts the jury's attention from the relevant issues"); See also State v. Sloan, 912 S.W.2d 592, 596 (Mo. Ct. App. 1995 (stating that "experts may testify as to their opinion on an ultimate issue in a criminal case").

In other words, the test that a trial court should employ in determining whether the witness' testimony qualifies as expert testimony is "whether the expert has knowledge from education or experience which will aid the trier of fact." State v. Scott, 996 S.W.2d 745, 748 (Mo. Ct. App. 1999). Therefore, the test for the admissibility of Dr. Martinez's testimony is not whether he is licensed physician but rather should be based upon his education and/or experience. See Landers v. Chrysler Corp., 963 S.W.2d 275, 281-282 (Mo. Ct. App. 1997) (holding that "an expert witness may be qualified on foundations other than the expert's education or license. 'There is no requirement that an expert witness have expertise based

solely on his education. An individual with substantial practical and specialized practical experience in a given area may also qualify as an expert' ... Missouri courts recognize that medical personnel, other than medical doctors, may be qualified to testify to matters "within the limited and precise range of their medical specialties"). (internal citations omitted).

In the case at bar, the trial court openly allowed the expert testimony of Dr. Long, a forensic toxicologist, but continually refused the testimony of Dr. Martinez, a clinical toxicologist. This denial was not based upon, presumably education or experience but was based solely on whether Dr. Martinez was licensed. However, no evidence was adduced that Dr. Long was licensed, and Mr. Rutter submits to this Court that this lack of evidence was because Dr. Long was not, as there was no license to be had.[4]

Candidly, the case law in Missouri is scant with references in the criminal context of a refusal to admit expert testimony. However, in State v. Platt, 496 S.W.2d 878, 884 (Mo. Ct.

[4] After a review of the statutes in Missouri, Mr. Rutter is completely unaware of any licensure requirement for a board certified toxicologist. However, Mr. Rutter is aware of Section 190.353.3 (1) which requires a board certified clinical toxicologist be provided at a Missouri Poison information center. Moreover, although no case law yet exists, Mr. Rutter submits that a clinical toxicologist may testify to the results of a toxicology screen as required in Section 191.737.1 (2). In fact, the Southern District admitted the testimony of Dr. Terry Martinez as an expert in a civil case involving the specific toxicological effects of chemical exposure in a workers' compensation claim. Cochran v. Industrial Fuels & Resources, Inc., 995 S.W.2d 489, 495 (Mo. Ct. App. 1999).

App. 1973), the Court held that a "qualified chemist, particularly one trained in toxicology, is competent to testify as to the effect of drugs upon the human body." Id. The core issue in that case was the effects of LSD on the individuals who ingest it. Id. at 883. The defense counsel objected as to the qualifications of the toxicologist to render an opinion to said effects. Id. The Platt Court squarely rejected this objection and stated that a toxicologist is a competent person to render such testimony. Id. at 884.

Mr. Rutter does submit that a trial court's statement that a witness is not qualified "at all" calls into question whether this testimony was credible and worthy of consideration. In fact, the trial court's comment in the presence of a jury substantially impairs Mr. Rutter's right to a fair and impartial trial. State v. Owens, 759 S.W.2d 73, 77 (Mo. Ct. App. 1988) (holding that "[a] trial judge's remarks or suggestions outside the presence of the jury do not prevent the defendant from having a fair and impartial trial," and thus if the comment is in the presence of the jury it must be determined whether said comment encroached upon a defendant's Constitutional rights).

Mr. Rutter also brings to this Court's attention Section 546.380 of the Missouri Statutes which provides, in part, that "[t]he court shall not, on the trial of the issue in any criminal case, sum up or comment upon the evidence." Additionally, Missouri Supreme Court Rule 27.06 also provides that "[i]n the trial of any criminal case the court shall not, in the presence of the jury, sum up or comment on the evidence."

In State v. Bearden, 748 S.W.2d 753, 756 (Mo. Ct. App. 1988), the Court reversed a defendant's conviction under plain error review because of a trial court's commenting on the

evidence in the presence of the jury. In that case, the trial court, in overruling the defense's objection addressing the State's closing argument involving facts not contained within the record, stated that there were several other witnesses that would cooberate the law enforcement officer that testified at trial. Id. at 755. The Court, in reversing the cause, stated that "[s]uch comments are inherently prejudicial plain error." Id. at 756.

In State v. Wren, 486 S.W.2d 447, 449 (Mo. 1972), the Court reversed a defendant's conviction due to a trial court's comment on the Defendant's examination of a witness. In that case, the trial court's comment, which was made in the presence of the jury, stated that it would allow the defense to inquire of the witness "ad nauseum." Id. at 448. The Court provided that "[t]he defense being offered was tenuous at best; but, if admissible at all, defendant was entitled to have it presented to the jury free of the stamp of disapproval placed there by the trial court." Id. at 449. Ultimately the Court held that "[s]uch reprimands or admonishments as may be called for toward counsel should be handled in such a manner as not to prejudice defendant's case in the eyes of the jury. A full review of the record makes it apparent that an undue burden was placed on defendant and that he was denied a fair trial." Id.

The primary question before the court is whether Dr. Terry Martinez, who is a board certified clinical toxicologist, qualified to testify as to the specific effects of Butalbital on individuals? It is clear that the trial court would not allow such testimony, and, in fact, inappropriately commented on same. It is beyond contest that Dr. Martinez has been recognized by the appellate courts of this State on at least six (6) separate occasions as an

expert at the trial level.[5] The trial court's statement that Dr. Martinez is not "qualified at all," and thus not an expert, in the presence of the jury, the limitations imposed on his testimony as to the specific effects of Butalbital, in light of the issues that were submitted to the jury for determination, was untenable, against reason, and resulted in substantial prejudice being suffered by Mr. Rutter in his ability to present evidence and irreparably impaired his right to a fair trial.

A critical issue at trial involved the specific effects of Butalibtal on an individual where the level is 6.3 micrograms. The State's expert was permitted to testify that the effect would be sedation. Dr. Martinez's testimony was limited in scope by the trial court, as well as negatively commented on by said court, and this limitation and comment prevented Mr. Rutter from presenting a full defense to the charges lodged against him. The State repeatedly argued that Mr. Hinkle could not have destroyed Mr. Rutter's home and could not have attacked him because of the levels of Butalbital. In fact, the State, during closing arguments, stated "remember [Dr. Long's] term, couch potato. So the defendant shoots an unarmed couch potato

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[5] See Booth v. Director of Revenue, 34 S.W.3d 221 (Mo. Ct. App. 2000); Meyer v. Director of Revenue, 34 S.W.3d 230 (Mo. Ct. App. 2000); Hamm v. Director of Revenue, 20 S.W.3d 924 (Mo. Ct. App. 2000); Cochran v. Industrial Fuels & Resources, Inc., 995 S.W.2d 489 (Mo. Ct. App. 1999); Green v. Director of Revenue, 961 S.W.2d 936 (Mo. Ct. App. 1998); State v. Walter, 918 S.W.2d 927, 930 (Mo. Ct. App. 1996) (recounting exchange by trial court wherein it stated that the prosecutor 'would probably acquiesce that he's an expert' when Dr. Martinez's curriculum vitae was presented into evidence).

and wants you to find self-defense." This is the precise prejudice, as stated by the State in its closing arguments. (Tr. 868:3-5); See also (Tr. 896:6-7, stating that "[a]nd he shot an unarmed man, who at best was a couch potato").

Therefore, in light of the trial court's ruling, in the presence of the jury, and the unjustifiable limitations placed on Dr. Martinez's testimony, and the trial court's refusal to recognize Dr. Martinez as an expert in the presence of the jury that mandate that this cause be remanded to the trial court for a new trial so that Mr. Rutter's may fully present the issue of self-defense to a jury. The State's repeated arguments of the specific effects of Butalbital recognize that said effects directly affect the jury's determination of self-defense. The trial court's declaration that Dr. Martinez is not an expert was an abuse of discretion, was untenable, and this ruling irreparably impaired Mr. Rutter's right to a fair trial guaranteed to him by the United States and Missouri Constitutions.

III. THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF DR. DEIDEKER'S TESTIMONY OF BULLET PATTERN COMPARISON IN DETERMINING THE DISTANCE BETWEEN MR. RUTTER AND MR. HINKLE AT THE TIME OF THE SHOOTING WHERE THIS OPINION AS TO DISTANCE WAS BASED SOLELY UPON DR. ROTHOVE'S TESTING OF BULLET PATTERNING WHERE SAID TESTING WAS CONDUCTED HORIZONTALLY AND THE EVIDENCE PRESENTED AT TRIAL ESTABLISHED THAT THE WEAPON WAS FIRED AT AN ANGLE IN THAT DR. DEIDEKER WAS NOT QUALIFIED TO DRAW SUCH A CONCLUSION OR RENDER SAID OPINIONS AND THEREFORE SAID EVIDENCE WAS WITHOUT PROPER FOUNDATION, WAS PRESENTED TO THE JURY TO BE AN EXPERT CONCLUSION AND THEREFORE VIOLATED MR. RUTTER'S RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18(A) AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

Mr. Rutter next presents the issue of whether the trial court erred in allowing Dr. Russell Deideker, a pathologist, to testify to certain "expert" conclusions regarding the approximate distance between the weapon in question and Mr. Hinkle through bullet patterning conducted by Mr. Carl Rothove, a criminalist at the Missouri Highway Patrol Crime Laboratory. It is Mr. Rutter's contention that Mr. Deideker's testimony was improper, without proper foundation and without the necessary expertise to render such an opinion, and thereby

prejudiced Mr. Rutter's right to a fair trial and due process of law.

The Sixth Amendment of the United States Constitution and Article I, Section 18(a) each guarantee a fair trial to a criminal defendant. U.S. Const. amend VI; Mo. Const. art. I, § 18(a). The Fifth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution guarantee a criminal defendant that he shall enjoy due process of law. U.S. Const. amend V; Mo. Const. art. I, § 10.

Dr. Carl Rothove, a criminalist with the Missouri Highway Patrol Crime Laboratory, testified as to his bullet patterning tests conducted with the weapon in question. (Tr. 361:21-25). Dr. Rothove testified that the bullet patterning, presented in State's Exhibits 28, was created by firing the weapon at various distances. (Tr. 363:23). Dr. Rothove further testified that when he created these bullet patterns the weapon was not fired at various angles, but rather was fired only horizontally or straight-forward. (Tr. 369:11:13).

Dr. Rothove further opined that in order to accurately determine the distance a weapon was fired when same is fired at an angle, the recreation would require multiple testing in order to reproduce the same pattern and "quite a few variables" must be considered. (Tr. 370:1-6). Dr. Rothove, when questioned whether the width alone may be used to determine distance, testified "that is a good place to start to look at and then take into consideration the variables that could be encountered." (Tr. 372:6-8).

Dr. Deideker testified at the trial in this matter that he conducted the autopsy of Mr. Hinkle. (Tr. 403:6). In conducting this autopsy, Dr. Deideker testified that he observed powder tattooing on Mr. Hinkle's head near the entry point of the bullet injury. (Tr. 409:22-

25). He testified that the size of this tattooing was approximately four (4) inches by two (2) inches (Tr. 410:17-18), and that its shape was "an ellipsoid or a rectangle." (Tr. 410:21-22).

Dr. Deideker also testified that the entrance wound on the head itself was elliptical or oval in shape. (Tr. 411:16-18). The testimony further indicated that this can be caused by the bullet entering the body at a slight angle. (Tr. 411:25; 412:1-14). Dr. Deideker further testified that the bullet traveled on an angle, which was slightly right to left path and slightly upward. (Tr. 412:20-21).

The State then attempted to have Dr. Deideker review Dr. Rothove's bullet patterning test results in an attempt to show the distance that the weapon was from Mr. Hinkle's head at the time it was fired. (Tr. 415:24-25; 416:1-3). Mr. Rutter objected to this testimony, in light of Dr. Rothove's testimony and Dr. Deideker's qualifications. (Tr. 416:4). Dr. Deideker further testified that bullet patterning is not his field of expertise, and that he is not a criminalist. (Tr. 422:10-14). The Court allowed Dr. Deideker to ultimately opine that the gun in this matter was fired four (4) to eight (8) inches from Mr. Hinkle's head. (Tr. 432:9-15).

The standard of review that this Court should employ in determining whether the trial court erred in allowing Dr. Deideker to testify to the aforementioned conclusions is one of abuse of discretion. State v. Woodworth, 941 S.W.2d 679, 698 (Mo. Ct. App. 1997) (holding that "[t]he admission of expert testimony is within the sound discretion of the trial court, and the trial court abuses that discretion only when its ruling is clearly against the logic of the circumstances or is arbitrary and unreasonable").

In State v. Watt, 884 S.W.2d 413, 416 (Mo. Ct. App. 1994), the Court reversed a

defendant's drug-related conviction where the expert witness was not properly qualified to render the opinion that the items were in fact controlled substances. In that case, the Court found that the State failed to lay a sufficient foundation as to the qualifications of this witness. Id. The Court recognized that "[t]estimony relating a declarant's expert opinion is not admissible if the declarant was not an expert making a statement concerning a matter within his expertise and as to which he would be competent to express an opinion if testifying in person." Id. at 415.

In State v. Love, 963 S.W.2d 236, 242 (Mo. Ct. App. 1997), the Court upheld a trial court's exclusion from evidence a witness' testimony as it relates to matters beyond her admitted filed of expertise. In that case, the witness admitted that her field of expertise did not include forensic analysis, and was not a forensic scientist. Id. at 241. The Court held that the trial court did not err in excluding from evidence the witness' opinion as it relates to matters beyond her scope of expertise. Id. at 242. Thus, it naturally follows, that if it was not error to refuse such evidence, it is error to receive same.

In the case at bar, Dr. Deideker clearly stated that bullet patterning is not his field of expertise. Yet, the trial court granted him the opportunity to render an opinion, before the jury in the context of expert opinion, that the distance between the weapon and Mr. Hinkle was four (4) to eight (8) inches. Moreover, Dr. Rothove's testing was conducted in a straight manner, and that no testing was conducted on an angle. In fact, Dr. Rothove, the bullet patterning expert, testified that many variables would have to be considered in determining a bullet pattern where the weapon was fired on an angle. Dr. Deideker clearly stated that the bullet's entry was

on an angle, not straight, and therefore comparing the bullet patterning from Dr. Rothove's tests and the bullet patterning Dr. Deideker claims to have observed on Mr. Hinkle is comparing the proverbial "apples to oranges."

As in Watt, and recognized in Love, Dr. Deideker was not qualified, by his own admission, to testify to the purported distance the weapon was fired based upon bullet patterning alone, let alone bullet patterning created in a completely different situation that did not consider the necessary variables.

Thus, the opinions expressed to the jury, in the context of an expert, with the trial court's approval, created a situation whereby Mr. Rutter's right to a fair trial was prejudiced. The violation of Mr. Rutter's right to a fair trial guaranteed by the United States and Missouri Constitution requires that Mr. Rutter's convictions be reversed, and this matter remanded for a new trial so that such "expert" conclusions may not be rendered in the presence of a jury.

IV. THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION DR. DEIDEKER'S TESTIMONY AS TO THE SPECIFIC EFFECTS OF BUTALBITAL IN THAT DR. DEIDEKER WAS NOT QUALIFIED TO DRAW SUCH A CONCLUSION OR RENDER SAID OPINIONS AND THEREFORE SAID EVIDENCE WAS WITHOUT PROPER FOUNDATION, WAS PRESENTED TO THE JURY TO BE AN EXPERT CONCLUSION AND THEREFORE VIOLATED MR. RUTTER'S RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18(A) AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

Mr. Rutter next presents the issue of whether the trial court erred in allowing Dr. Russell Deideker, a pathologist, to testify to certain "expert" conclusions regarding the specific effects of Butalibital on an individual. It is Mr. Rutter's contention that Dr. Deideker's testimony was improper, without proper foundation and without the necessary expertise to render such an opinion, and thereby prejudiced Mr. Rutter's right to a fair trial and due process of law.

The standard of review that this Court should employ in determining whether the trial court erred in allowing Dr. Deideker to testify to the specific effects of Butalbital is one of abuse of discretion. State v. Woodworth, 941 S.W.2d 679, 698 (Mo. Ct. App. 1997) (holding that "[t]he admission of expert testimony is within the sound discretion of the trial court, and the trial court abuses that discretion only when its ruling is clearly against the logic of the

circumstances or is arbitrary and unreasonable").

The Sixth Amendment of the United States Constitution and Article I, Section 18(a) each guarantee a fair trial to a criminal defendant. U.S. Const. amend VI; Mo. Const. art. I, § 18(a). The Fifth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution guarantee a criminal defendant that he shall enjoy due process of law. U.S. Const. amend V; Mo. Const. art. I, § 10.

Dr. Deideker testified at trial regarding the specific effects of Butalbital, which was the prescription medication found in Mr. Hinkle's system at the time of his death. (Tr. 435:4). Mr. Rutter timely objected to Dr. Deideker's testimony as to the effects of this drug on the common person, (Tr. 436:6-8), however, the trial court overruled said objection. (Tr. 436:15). Dr. Deideker testified that the characteristics of an individual with 6.3 micrograms per milliliters of Butalbital would be sedation and drowsiness, and not violent behavior. (Tr. 437:3-16). Dr. Deideker candidly admitted that he is not an expert in this particular field, (Tr. 442:8), and that his "opinion" was based on his reference to only two (2) separate medical texts. (Tr. 438:13-16).

In State v. Watt, 884 S.W.2d 413, 416 (Mo. Ct. App. 1994), the Court reversed a defendant's drug-related conviction where the expert witness was not properly qualified to render the opinion that the items were in fact controlled substances. In that case, the Court found that the State failed to lay a sufficient foundation as to the qualifications of this witness. Id. The Court recognized that "[t]estimony relating a declarant's expert opinion is not admissible if the declarant was not an expert making a statement concerning a matter within

his expertise and as to which he would be competent to express an opinion if testifying in person." Id. at 415.

In State v. Love, 963 S.W.2d 236, 242 (Mo. Ct. App. 1997), the Court upheld a trial court's exclusion from evidence a witness' testimony as it relates to matters beyond her admittedfiledof expertise. In that case, the witness admitted that her field of expertise did not include forensic analysis, and was not a forensic scientist. Id. at 241. The Court held that the trial court did not err in excluding from evidence the witness' opinion as it relates to matters beyond her scope of expertise. Id. at 242. Thus, it naturally follows, that if it was not error to refuse such evidence, it is error to receive same.

At trial, Dr. Diedeker admitted that the effects of Butalbital were beyond his expertise. Thus, as in Watt, and recognized in Love, Dr. Deideker was not qualified, by his own admission, to testify to the specific effects that Butalbital would have on an individual. The trial court's allowing Dr. Deideker to opine in this regard resulted in a violation of Mr. Rutter's right to a fair trial and due process and mandates that his convictions be set aside and held for naught, and that this matter be remanded for a new trial.

V. THE TRIAL COURT ERRED IN NOT GRANTING MR. RUTTER'S MOTION FOR NEW TRIAL BASED UPON THE ADMITTED ERROR IN THE TESTIMONY OF TONY COLE IN THAT SAID TESTIMONY INVOLVED THE NEGATIVE IMPLICATION, WHICH WAS REPEATEDLY ARGUED BY THE STATE, THAT MR. RUTTER OBTAINED A PRESCRIPTION FOR BUTALBITAL IN THE NAME OF MR. RUTTER'S DECEASED RELATIVE IN THAT SAID TESTIMONY AND THE ARGUMENTS MADE THEREON SUBSTANTIALLY PREJUDICED MR. RUTTER'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE UNITED STATES AND MISSOURI CONSTITUTIONS.

The next issue presented to this Court is whether the trial court erred in refusing to grant Mr. Rutter's Motion for New Trial where said motion hearing included the testimony of Tony Cole admitting that his trial testimony was in error as it concerns whether Mr. Rutter obtained a prescription in a deceased relative's name. It is Mr. Rutter's position that said testimony and the arguments made by the State, in light of the admitted error in testimony, resulted in substantial prejudice being suffered by Mr. Rutter and his right to a fair trial and due process of law.

The Sixth Amendment of the United States Constitution and Article I, Section 18(a) each guarantee a fair trial to a criminal defendant. U.S. Const. amend VI; Mo. Const. art. I, § 18(a). The Fifth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution guarantee a criminal defendant that he shall enjoy due process of law.

U.S. Const. amend V; Mo. Const. art. I, § 10.

This Court's standard of review is whether said decision was an abuse of the trial court's discretion. State v. Stone, 869 S.W.2d 785, 786 (Mo. Ct. App. 1994). Additionally, as it concerns the grant or denial of a motion for new trial, a review by the appellate court is more deferential to the grant of a new trial by the trial court than when there is a denial of same. Id. at 787.

The evidence that is in question is Tony Cole's statement that he found in Mr. Rutter's home a bottle of prescription medication that belonged to Kenneth Rutter. (Tr. 382:22-24). The prescription medication was Butalbital (Tr. 383:2-4), had been filled the day prior and there were only three (3) pills remaining. (Tr. 383:15-20). Kenneth Rutter is Mr. Rutter's grandfather who died in 1998. (Tr. 387:1-3). Mr. Cole further testified that he did not seize this prescription bottle, with the purported name of Kenneth Rutter, because the arresting officers took this bottle to the jail with Mr. Rutter in the event that he needed his medication. (Tr. 384:8-10).

Despite the fact that the officers took Mr. Rutter's medication with him when taking Mr. Rutter into custody, the State, based upon Mr. Cole's testimony, cross-examined Mr. Rutter about filling prescriptions in his "dead uncle's name down in Poplar Bluff." (Tr. 670:25; 671:1-2). The State further argued in closing the following:

> Tony Cole said he died between 11:00 and 2:00. Well, he told you that was an estimate, didn't he. Yet somehow that becomes the Holy Grail to hear the defense tell it. However, there is one

> things [sic] that he remembers very clearly that he told you about. That is the Butalbital prescription in the name of Kenneth Rutter, the dead uncle of the Defendant that had been filled within 48 hours prior to the scene and only had two (2) or three (3) tablets left. Now that's real suspicious to me, particularly when you consider you have a near toxic level of Butalbital in the victim.

(Tr. 890:2-13).

At the hearing on Mr. Rutter's Motion for New Trial, Tony Cole's testimony was presented. Mr. Cole testified that his identifying the name of Kenneth Rutter on this prescription bottle was in error, when he in fact meant Charles Rutter. (Tr. 922:11-19). Mr. Cole further stated that "I made an error in my report, yes, and I would have to say that the prescription I believe was for Charles Rutter." (Tr. 922:24-25; Tr. 923:1). Mr. Cole once again stated that "It was Mr. Rutter's prescription and I believe that they took that to jail." (Tr. 925:6-7).

It is clear that Mr. Cole was in error in testifying before the jury that Mr. Rutter possessed a prescription medication in the name of Kenneth Rutter. The bottle was not seized by Mr. Cole, but rather was taken with Mr. Rutter to the Iron County Jail. The State, prior to presenting the testimony of Mr. Cole, knew that Mr. Rutter's prescription medication was taken with him when he was taken into custody. Therefore, the issue before this court is, in light of Mr. Cole's incorrect trial testimony that the prescription medication was in the name of Kenneth Rutter, in light of the State repeatedly arguing that Mr. Rutter sought out

prescriptions in his dead uncle's name, and in light of the fact that the State knew that this medication was taken into custody with Mr. Rutter because it was his medication, whether Mr. Rutter must be granted a new trial in this matter.

In order to justify the grant of a new trial based upon newly discovered evidence, Mr. Rutter must establish the following:

> (1) the evidence has come to the knowledge of defendant since the trial; (2) it was not owing to want of due diligence that it was not discovered sooner; (3) the evidence is so material that it would probably produce a different result on a new trial; and (4) it is not cumulative only or merely impeaching the credibility of the witness.

Stone, 869 S.W.2d at 787. As it concerns the above elements that Mr. Rutter must establish, it cannot be readily contested that the evidence only came to light after the trial (L.F. 136). It also cannot be readily contested that it was not for a want of due diligence by Mr. Rutter, as it was Mr. Rutter's counsel's cross-examination that inspired Mr. Cole's reexamination of his notes. (Tr. 926:1-2). It also cannot be readily contested that it was cummulative, as Mr. Cole is the only witness that testified that the prescription was in a name other than Charles Rutter. It also cannot be contested that this incorrect evidence reaches beyond the scope of mere impeachment evidence, as the State elicited same in the direct testimony of Mr. Cole, (Tr. 382:22-24), and relied upon same in its closing arguments. (Tr. 890:2-13). Thus, the core issue is whether this error is so material that it would probably produce a different result on

a new trial.

In State v. Stone, 869 S.W.2d 785, 789 (Mo. Ct. App. 1994), the Court upheld a trial court's granting of a defendant's motion for new trial. In that case, the defendant was convicted of forgery. Id. at 786. The evidence in question was the submission of items for fingerprint analysis, and the result of this examination was that the defendant's fingerprint did not yield a match. Id. Additionally, a handwriting analysis produced a result that the defendant's handwriting exemplars were largely inconsistent with the items in question. Id. The Court, in examining the materiality of the new evidence, stated that "[t]o satisfy this requirement, the newly discovered evidence need only be 'credible and reasonably sufficient to raise a substantial doubt in the mind of a reasonable person as to the result in the event of a new trial.'" Id. at 787.

In the case at bar, the State's argument of obtaining false prescriptions in Mr. Rutter's dead uncle's name was made in attempt to inject the issue of uncharged crimes, wrongs or acts of Mr. Rutter. Evidence of such uncharged crimes, wrongs, or acts is generally inadmissible for the purpose of showing the propensity of the defendant to commit a crime. State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993). The exceptions to this rule of inadmissibility include if the evidence is logically relevant, "in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial." Id. This is precisely what the State argued in its close when it stated "that's real suspicious to me, particularly when you consider you have a near toxic level of Butalbital in the victim."

The injection of uncharged criminal acts, the manner in which the State presented this

incorrect testimony, and the argument made to the jury of the suspicious nature of obtaining false prescriptions for the same medication found in the victim, and the negative implications the jury drew from this incorrect testimony and argument evidences that this piece of evidence was critical to the State's case and played an instrumental role in the jury's arriving at a guilty verdict. Moreover, in light of the State's knowledge that the prescription bottle was taken with Mr. Rutter to the county jail indicates that the State knew, or should have known that this testimony was in error.

Thus, Mr. Rutter prays that this Court enter an Order reversing his convictions for Murder in the First Degree and Armed Criminal Action, and remanding this cause for a new trial so that the proper, competent and credible evidence may be presented to the jury.

VI. THE TRIAL COURT ERRED IN REFUSING TO ALLOW MR. RUTTER TO PRESENT EVIDENCE OF SPECIFIC ACTS OF VIOLENCE BY MICHAEL HINKLE, THE VICTIM, IN THAT SAID EVIDENCE WAS ADMISSIBLE IN ORDER TO ESTABLISH AND SUPPORT THE DEFENDANT'S FEAR AND APPREHENSION OF MR. HINKLE WHICH IS ESSENTIAL TO MR. RUTTER'S SUBMISSION OF HIS ACTING IN SELF-DEFENSE, AND THIS ERROR SUBSTANTIALLY IMPAIRED MR. RUTTER'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW BESTOWED UPON HIM BY THE UNITED STATES AND MISSOURI CONSTITUTIONS.

This issue concerns whether the trial court erred in refusing to allow Mr. Rutter to introduce at trial evidence of Mr. Hinkle's prior specific acts of violence. It is Mr. Rutter's contention that he was entitled to present such evidence in support of his submission of self-defense and the trial court's precluding this presentation substantially impaired Mr. Rutter's right to a fair trial and due process of law.

The Sixth Amendment of the United States Constitution and Article I, Section 18(a) each guarantee a fair trial to a criminal defendant. U.S. Const. amend VI; Mo. Const. art. I, § 18(a). The Fifth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution guarantee a criminal defendant that he shall enjoy due process of law. U.S. Const. amend V; Mo. Const. art. I, § 10.

Mr. Rutter filed with the trial court a Motion in Limine seeking the introduction of Mr. Hinkle's prior specific acts of violence. (L.F. 83). At trial, during an in camera hearing, Mr.

Rutter testified (Tr. 576:3-683:10) and also offered the testimony of Steven Craigmiles (Tr.568:8-575:16). Mr. Craigmiles testified that, in June of 1998 (Tr. 570:22-24), he was attacked, without provocation, by Mr. Hinkle and was struck three (3) separate times in the face and head area. (Tr. 573:5-17). Mr. Rutter testified that he was aware of the details of this specific attack by Mr. Hinkle (Tr.577:12-14). In fact, Mr. Rutter also testified that Mr. Hinkle would brag about this incident, and had done so as recently as two (2) months preceding the shooting in question. (Tr. 581:24-25).

The trial court found the evidence offered not too remote in time (Tr. 583:22 and Tr. 585:2-6), but nonetheless refused Mr. Rutter the opportunity to present these acts of violence in his case-in-chief because the trial court did not believe it was of sufficient quality. (Tr. 583:15-25; 584:1-9 and 589:14-17).

The jury was instructed as to the issue of self-defense (L.F. 97-98 and 100-101) and said instruction squarely implicates Mr. Rutter's state of mind and the reasonableness of his beliefs. The State, during closing arguments argued that Mr. Rutter is the individual that destroyed the house, and not Mr. Hinkle as testified to by Mr. Rutter. (Tr. 864:20-22), and also argued that the physical injuries suffered by Mr. Rutter were self-inflicted. (Tr. 868:20-23).

Thus, the issue before this Court is whether the trial court erred in refusing to admit into evidence the specific prior attack by Mr. Hinkle on Mr. Craigmiles where Mr. Hinkle would boast of this attack, and did so even two (2) months prior to April of 1999. It is Mr. Rutter's contention that said evidence was directly relevant to the issue of self-defense, and

the trial court's refusal to allow Mr. Rutter to present this evidence substantially impaired his ability to present this defense and his right to a fair trial.

The standard of review that an appellate court must employ when examining a trial court's exclusion of specific acts of violence evidence is abuse of discretion. State v. Johns, 34 S.W.3d 93, 111 (Mo. 2000).

In State v. Waller, 816 S.W.2d 212, 213 (Mo. 1991), the Missouri Supreme Court abolished the prohibition against a defendant's offering of proof of a victim's prior acts of violence. In Waller, the defendant was convicted of voluntary manslaughter where the victim was killed after being beaten with a maul handle. Id. at 214. Additionally, the jury was instructed of self-defense. Id.

The evidence that defendant desired to introduce was that of the victim's specific prior act of violence against a third party. Id. This evidence centered upon the victim's forced entry into another's apartment, and the swinging of club, similar to the maul handle in this matter, by the victim and striking the third party. Id. at 217. The defendant would have testified that he was aware of this incident. Id.

The defendant testified at trial that the victim was the initial aggressor in the instant matter, and, in fact, attacked the defendant with the maul handle. Id. The defendant further testified that he knocked this handle from the victim's hand, and was forced to use this handle on the victim when the victim attempted to attack him with a knife. Id. The trial court refused the admission into evidence this specific act of violence. Id.

The Waller Court held that such evidence is admissible if the defendant is aware of the specific act, is not too remote in time and is of a quality that would be capable of contributing to the defendant's fear of the victim. Id. at 216. The Court recognized that when the defense of justification is presented the defendant's state of mind is "critical." Id. at 215. The Waller Court reversed the defendant's conviction and remanded the matter for retrial because it could not "conclude that there is no significant probability that the jury might have credited the defense of justification had it been apprised of the victim's prior specific act of violence." Id. at 217. The Court further stated that "the perceptions and the state of mind of the participants in the altercation are critical to the defense of justification." Id.

Similar to Waller, Mr. Rutter presented and the jury was instructed as to self-defense. Mr. Rutter testified that he was aware of the specific act of violence sought to be admitted, and the offer of proof was further established through the testimony of Mr. Craigmiles. In fact, the evidence established that Mr. Hinkle continued to boast of this violent behavior for a substantial period of time thereafter. The trial court did not find that this evidence was too remote in time, but rather thought the violent behavior was not of sufficient quality. However, the prior specific act that Mr. Rutter desired to be presented to the jury, that Mr. Hinkle attacked Mr. Craigmiles with his fists without provocation, was closely akin to the violence that Mr. Rutter suffered at the hands of Mr. Hinkle. See Waller, 816 S.W.2d at 217 (evidence that victim attacked other individuals with a handle should be admitted where defendant testified that victim attacked him with similar handle).

Thus, Mr. Rutter prays for an Order of this Court declaring that the exclusion of this

evidence was in error, and entering an Order reversing Mr. Rutter's convictions and affording Mr. Rutter a new trial so that he may properly place this evidence before a jury.

VII. THE TRIAL COURT ERRED BY ITS REFUSAL OF DEFENDANT'S REQUESTED JURY INSTRUCTION OF VOLUNTARY MANSLAUGHTER, MAI-CR 3D. 313.08 IN THAT THE TENDERED INSTRUCTION WAS SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL WHERE EVIDENCE WAS PRESENTED THAT MR. RUTTER WAS ATTACKED IN HIS OWN HOME AND SUCH AN INSTRUCTION IS NOT PROHIBITED WHERE THE ISSUE OF SELF-DEFENSE IS PRESENTED TO THE JURY AND THEREFORE THE TRIAL COURT'S REFUSAL SUBSTANTIALLY IMPAIRED HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18(A) OF THE MISSOURI CONSTITUTION AND FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION GUARANTEEING MR. RUTTER DUE PROCESS OF LAW.

The next issue that Mr. Rutter presents to this Court is whether the trial court erred in refusing his requested jury instruction as and for Voluntary Manslaughter, which was in strict compliance with MAI-CR 3d. 313.08. (L.F. 106); (Tr. 848:2-6). Mr. Rutter submits to this Court that said instruction was required to be presented to the jury based upon the facts presented at trial, which injected the issue of sudden passion arising from adequate cause. Additionally, Mr. Rutter submits to this Court that the trial court's ruling was further in error wherein it found that said instruction was prohibited by Mr. Rutter's submission of self-

defense, and thereby his acknowledging that the act was intentional. (Tr. 847:21-24).

The Sixth Amendment of the United States Constitution and Article I, Section 18(a) each guarantee a fair trial to a criminal defendant. U.S. Const. amend VI; Mo. Const. art. I, § 18(a). The Fifth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution guarantee a criminal defendant that he shall enjoy due process of law. U.S. Const. amend V; Mo. Const. art. I, § 10.

"In determining whether a defendant is entitled to a particular jury instruction, the appellate court reviews the evidence in the light most favorable to the defendant." State v. Hahn, 37 S.W.3d 344, 348 (Mo. Ct. App. 2000). A defendant is entitled to a voluntary manslaughter instruction if it is "supported by the evidence and any inferences that logically flow from the evidence." Id. Moreover, if said requested instruction is supported by the evidence and inferences therefrom, and said instruction is not given, this refusal usually results in reversible error. Id. (stating that "[e]rror results when the trial court fails to give an instruction that is required by Missouri Approved Instructions").

In this matter, evidence was adduced that Michael Hinkle came to Mr. Rutter's home and inquired as to whether Mr. Rutter possessed any marijuana. (Tr. 612:7-8). Mr. Rutter advised Mr. Hinkle that he did not have any, to which Mr. Hinkle stated that he had some money and wanted to go buy some. (Tr. 612:21-22). Mr. Rutter advised Mr. Hinkle that he was without transportation, and that Mr. Hinkle did not need to get high. (Tr. 613:1-2; 614:1-3). Mr. Rutter testified that Mr. Hinkle then became agitated, (Tr. 614:5-6), and stated that Mr. Rutter did not know what he needed. (Tr. 614: 1-3). Mr. Rutter advised him that if he was

going to get mad "he could just take his happy little ass home." (Tr. 614:10-12). Mr. Hinkle began to jump around and said "make me go home." (Tr. 614:14-15). Mr. Rutter advised him to sit down and relax, and Mr. Hinkle said no, make me go home. (Tr. 614:17-22).

Mr. Rutter testified that Mr. Hinkle then takes a club and destroyed the lights in the ceiling fan. (Tr. 616:1-2). Mr. Hinkle then used the club to break the window in the living room. (Tr. 616:25; 617:1). Mr. Rutter asked Mr. Hinkle to "chill out," (Tr. 617:21), and Mr. Hinkle told him no. (Tr. 618:2). Mr. Hinkle then began a rampage, and began destroying Mr. Rutter's home.

Mr. Rutter also testified that, during this rampage, he was attacked by Mr. Hinkle and suffered physical injuries. Mr. Hinkle kicked Mr. Rutter in the kidneys while Mr. Rutter was on his hands and knees on the floor, (Tr. 622:16-17), punched him in his eye, (Tr. 623:8-9), and kicked him in the head. (Tr. 623:11-12). In addition to causing these physical injuries, Mr. Rutter testified that Mr. Hinkle displayed a knife and destroyed Mr. Rutter's waterbed. (Tr. 616:11-636:19). In fact, multiple witnesses testified to the destruction and disarray of Mr. Rutter's home. For example, Mr. Charles Warren testified the home was in "total disarray, I mean things were broken and slashed." (Tr. 303:4-5). It was also uncontested at trial that Mr. Hinkle had near toxic levels of Butalbital. (Tr. 453:22).

The State presented the testimony of Charles Warren, an emergency medical technician that responded to the scene. (Tr. 287:13; 288:16). Mr. Warren testified that his partner, Gina Warren, accompanied him to the scene, (Tr. 289:4-6), and that Ms. Gina Warren treated the injuries suffered by Mr. Rutter. (Tr. 294:22-23; 295:9-10). Mr. Warren testified that there

was "an inch to two inch laceration" on Mr. Rutter's cheekbone. (Tr. 295:9-10). Ms. Gina Warren testified that Mr. Rutter suffered an injury to his forehead, (Tr. 761:10-11), and appeared to be in shock. (Tr.761:21). Pastor Donald Dement testified that Mr. Rutter appeared to be beat up and "had cuts on his face." (Tr. 258:17-20). Jerry Mann testified that Mr. Rutter's eye was blue and there was a cut underneath. (Tr. 285:3-5).

The evidence further established that Mr. Rutter suffered, and continues to suffer from a brain tumor, and was diagnosed with neurofibromentosis, and received social security disability due to these physical problems. (Tr. 607:4-8). Moreover, Mr. Rutter testified that he has a real fear of being struck in his head because of the location and severity of the brain tumor. (Tr. 607:19-21).

Evidence was also presented that, after physically attacking Mr. Rutter and destroying Mr. Rutter's home, Mr. Hinkle said "I'm going to finish the job and I'm going to kill you." (Tr.651:23-24). Mr. Hinkle then started towards the closet where two (2) .22 rifles and one (1) loaded .12 gauge shotgun were kept. (Tr. 636:25; 637:3). Mr. Rutter repeatedly asked Mr. Hinkle to stop, Mr. Hinkle did not, but rather continued towards the closet. (Tr. 653:1-2). At this point, and believing that Mr. Hinkle would kill Mr. Rutter and Mr. Rutter "knew [he] was going to die", while Mr. Hinkle is bent over in the closet and reaching to the location where the guns were kept, Mr. Rutter is forced to shoot Mr. Hinkle. (Tr. 653:3-25; 654:1-15). From the moment Mr. Hinkle utters his deadly threat to the time that the one (1) fatal shot is fired only seconds elapsed. (Tr. 653:11).

The evidence also established that Mr. Rutter, after certain individuals arrived at his

house, is overheard telling Mrs. Joan Hinkle, Mr. Hinkle's grandmother, that "he was going for a gun or he was, that I had to defend myself or something like that." (Tr. 252:2-4). Mr. Mann testified that Mr. Rutter, while awaiting the arrival of law enforcement officers, stated that they had a fight and Mr. Rutter had to kill him for fear of his own life. (Tr. 279:6-7).

Mr. Rutter, during the jury instruction conference, which lasted approximately two (2) hours, requested that the jury be instructed of Voluntary Manslaughter. (Tr.843:14; 846:17-22) (L.F. 106). Said instruction was as follows:

> As to Count ___, if you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter.
>
> As to Count ___, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about April 4, 1999, in the County of Iron, State of Missouri, the defendant caused the death of Michael Hinkle by shooting him, and
>
> Second, that defendant was aware that his conduct was practically certain to cause the death of Michael Hinkle, or that it was the defendant's purpose to cause serious physical injury to Michael Hinkle,
>
> then you will find the defendant guilty under Count ___ of

voluntary manslaughter.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of voluntary manslaughter.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

If you do find the defendant guilty under Count ___ of voluntary manslaughter, you will assess and declare the punishment at imprisonment for a term of years fixed by you, but not less than five years and not to exceed fifteen years.

(L.F. 106). The State objected to its submission based upon, in part, the fact that "involuntary manslaughter" cannot be offered to the jury where self-defense was submitted to the trier of fact. (Tr. 847:4-20). The trial court adopted the State's argument due to the fact that Mr. Rutter testified that his actions were intentional, and not accidental. (Tr. 847:21-25; 848:2-6). However, the crux of the trial court's denial of this instruction was based upon the erroneous proposition that Mr. Rutter desired an instruction of involuntary manslaughter, when, in fact, he requested that the jury be instructed as to voluntary manslaughter.

The Missouri Supreme Court has held that "[a] trial court is required to instruct on a

lesser included offense if the evidence, in fact or by inference, provides a basis for both an acquittal of the greater offense and a conviction of the lesser offense, and if such instruction is requested by one of the parties or the court." State v. Redmond, 937 S.W.2d 205, 208 (Mo. 1996). Voluntary manslaughter is defined "as causing the death of another person under circumstances that would constitute murder in the second degree, except that the death was caused 'under the influence of sudden passion arising from adequate cause.'" Redmond, 937 S.W.2d at 208 citing V.A.M.S. § 565.023 (1983).

The term "sudden passion" is defined as "passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation." V.A.M.S. § 565.002 (7) (1983). "Passion" for purposes of voluntary manslaughter may arise from emotions including, but not limited to, "rage or anger, or terror." Clark v. State, 30 S.W.3d 879, 883 (Mo. Ct. App. 2000). The term "adequate cause" is defined as "cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." V.A.M.S. § 565.002 (1) (1983).

Thus, as it relates to the case at bar, if there is sufficient evidence presented at trial of sudden passion or provocation arising from adequate cause, the trial court must instruct the jury of voluntary manslaughter. Redmond, 937 S.W.2d at 208; See also State v. Fouts, 939 S.W.2d 506, 511 (Mo. Ct. App. 1997) (stating that "[t]he court's role is to determine if testimony presented would support a finding that the victim was killed under circumstances in which defendant was under the influence of sudden passion arising from adequate cause"). Mr.

Rutter acknowledges that the current case law indicates that a refusal of voluntary manslaughter, where the defendant is convicted of murder in the first degree, is harmless error. State v. Winfield, 5 S.W.3d 505, 513 (Mo. 1999). However, Mr. Rutter encourages this Court to re-examine such a determination as it concerns the case at bar.

In Redmond, the Missouri Supreme Court reversed a defendant's second degree murder conviction and armed criminal action conviction due to the trial court's refusal to give a voluntary manslaughter instruction. 937 S.W.2d at 206. The trial in that cause included evidence that the defendant and the victim argued, and that the defendant felt that his life was in danger. Id. at 207. The defendant also testified that the victim was armed with a gun, however no other supporting evidence was introduced as to the existence of this gun. Id. at 207.

The Redmond Court held that "the threatening confrontation described by Redmond along with the showing of a gun is the type of provocation that could cause a reasonable person to lose self-control." Id. at 209. The Court also echoed the holding of State v. Fears, 803 S.W.2d 605, 609 (Mo. 1991), by stating that:

> the aggregate of the insulting words, offensive gestures and physical contacts that occurred during this encounter was ... sufficient to put [the defendant] in fear of serious bodily harm, carried out in a time span insufficient for [the defendant's] anger to cool, and sufficient for reasonable persons to have found that [the defendant] acted under 'sudden passion.'

Redmond, 937 S.W.2d at 208. Therefore, the Court held that this evidence is sufficient to give rise to the existence of sudden passion arising from adequate cause, and the trial court committed reversible error in refusing to instruct the jury of voluntary manslaughter. Id.

The Redmond Court also went on to hold that a self-defense instruction and a voluntary manslaughter instruction are not mutually exclusive. Id. at 209. The trial court in that case believed, and the State argued, that because the jury was instructed on self-defense, the defendant was not entitled to a voluntary manslaughter instruction. Id. However, the Redmond Court clearly stated that "each instruction should be evaluated separately and should be given if supported by the evidence, without regard to whether the other instruction is given." Id. at 210. This separate evaluation is required because the issue is whether the defendant's actions were reasonable in self-defense, and this same reasonableness is not required in order to find a defendant guilty of voluntary manslaughter. Id. at 209. Additionally, because the underlying conviction of murder in the second degree was reversed, the defendant's conviction of armed criminal action also required reversal. Id. at 210 (stating that "[r]eversal of Redmond's conviction of murder in the second degree also requires reversal of his conviction of armed criminal action, as conviction of the latter requires commission of an underlying felony").

In Fouts, this Court reversed a defendant's murder in the second degree conviction due to the trial court's refusal to instruct the jury of voluntary manslaughter. 939 S.W.2d at 508. The defendant testified that he and the victim, his wife, argued, that the victim shouted threats and obscenities at the defendant, and that the victim assaulted Defendant with a board and a

knife. Id. at 509. The Defendant claimed on appeal that because evidence was adduced that the victim hit, screamed and waived a knife at the defendant, the jury should have been instructed of voluntary manslaughter. Id. at 510. This Court agreed with the defendant, and remanded the case for a new trial. Id. at 511.

The Fouts Court recognized the existence of evidence that the defendant and the victim engaged in a "heated argument" and that the defendant was threatened by the victim with bodily injury. Id. at 511. The Court held that a jury could have accepted the defendant's testimony concerning the circumstances leading up to the victim's death, and stressed it is "[t]he jury, not the court, [that] determines the credibility of witnesses." Id. Additionally, the fact that the defendant injected the issue of self-defense at trial has no effect as to whether the voluntary manslaughter instruction must be given by the trial court. Id. The defendant requested the manslaughter instruction, and the trial court's refusal to give said instruction constituted reversible error. Id.

In the case at bar, and like Redmond and Fouts the evidence presented was sufficient to require that the trial court instruct the jury of voluntary manslaughter. The evidence presented at trial included the fact that Mr. Hinkle assaulted Mr. Rutter by his kicking and punching Mr. Rutter in the head and about his body, that Mr. Hinkle destroyed Mr. Rutter's home. Moreover, evidence was presented that Mr. Hinkle told Mr. Rutter that Mr. Hinkle was going to kill him, and that Mr. Rutter fired the fatal shot only when Mr. Hinkle went to, and reached in the closet to retrieve a loaded shotgun. This evidence clearly establishes more than mere words, but, as the Redmond Court echoed from Fears, the aggregate of the words, contacts, and actions inject

the issue of sudden passion arising from adequate circumstances, and therefore this evidence mandated that the trial court instruct the jury of voluntary manslaughter. The trial court's failure to instruct the jury of voluntary manslaughter, including the rationale employed by the trial court in refusing same, results in reversible error. As such, Mr. Rutter's conviction of murder in the first degree and armed criminal action must be reversed, and this cause remanded for a new trial.

CONCLUSION

Wherefore, in light of the foregoing, Mr. Rutter prays that this Court enter an order reversing his convictions of Murder in the First Degree and Armed Criminal Action, and remanding this matter to the trial court for purposes of a new trial.

SIGNATURE BLOCK

The foregoing brief is respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of August, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to Breck K. Burgess, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

The undersigned further hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and the brief contains 24,490 words.

The undersigned also hereby certifies that the labeled disk, simultaneously filed with the hard copies of the brief, was scanned for viruses and is virus free.

Respectfully submitted,

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